Supreme Court, U.S.
FILED
061046 JAN 29 2007
OFFICE OF THE CLERK

No. 07-

IN THE

Supreme Court of the United States

CETEWAYO ASKIA BRIGGS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN Q. LEWIS*
WILLIAM BLAISE WARREN
JONES DAY
901 Lakeside Avenue
Cleveland, OH 44114
(216) 586-3939

Counsel for Petitioner

** Counsel of Record*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

(1) Did the Court's decision in *United States v. Booker* announce a new rule as defined in *Teague v. Lane*, or was the holding dictated by *Apprendi v. New Jersey*?

(2) If *Booker* announced a new rule, should it be applied retroactively to cases on collateral review?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS AND ORDERS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 6

I. THIS COURT SHOULD RESOLVE THE IMPORTANT ISSUE OF, AND SPLIT OF AUTHORITY OVER, WHETHER *BOOKER* ANNOUNCED A NEW RULE 6

A. This Court Recognized The Importance Of Determining Whether *Booker* (and *Blakely*) Apply Retroactively By Granting Certiorari In *Burton v. Stewart* 10

B. Courts Are Divided Over The Issue Of Whether *Booker* Announced A New Rule 12

II. THE DECISION BELOW CONTRAVENES THIS COURT'S PRECEDENT 15

A. The Rule Announced In *Booker* Was Not A New Rule, But Rather Was Dictated By *Apprendi* 15

B. Even If *Booker* Announced A New Rule, The Sixth Circuit Erred In Holding That It Does Not Apply Retroactively 18

1. *Booker* announced a substantive rule falling under the first *Teague* exception 18

TABLE OF CONTENTS
(Continued)

Page

2. *Booker* announced a watershed rule of criminal procedure.....24

CONCLUSION.....27

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Apprendi v. New Jersey,
530 U.S. 466 (2000) ..... *passim*

Beard v. Banks,
542 U.S. 406 (2004) ..... *passim*

Blakely v. Washington,
542 U.S. 296 (2004) ..... *passim*

Bousley v. United States,
523 U.S. 614 (1998) 19

Butler v. McKellar,
494 U.S. 407 (1990) 16

Burton v. Stewart,
127 S. Ct. 793 (2007) 6, 10, 11

Caspari v. Bohlen,
510 U.S. 383 (1994) 15

Clay v. United States,
537 U.S. 522 (2003) 15

Cunningham v. California,
549 U.S. __ (2007) ..... *passim*

Desist v. United States,
394 U.S. 244 (1969) 21, 24

Duncan v. Louisiana,
391 U.S. 145 (1968) 25

Eddings v. Oklahoma,
455 U.S. 104 (1982) 16

Gideon v. Wainwright,
372 U.S. 335 (1963) 25

Godfrey v. Georgia,
446 U.S. 420 (1980) 16

TABLE OF AUTHORITIES
(Continued)

Page

Griffith v. Kentucky,
479 U.S. 314 (1987) 14

Guzman v. United States,
404 F.3d 139 (2d Cir. 2006) 15

Hankerson v. North Carolina,
432 U.S. 233 (1970) 20

Hubbard v. United States,
514 U.S. 695 (1995) 14

Humphress v. United States,
398 F.3d 855 (6th Cir. 2005) 5, 14, 15

Ivan V. v. City of New York,
407 U.S. 203 (1972) 20, 21

Jones v. United States,
526 U.S. 227 (1999) 6, 13

Kessack v. United States,
No. C05-1828Z, 2006 U.S. Dist. LEXIS 80734
(W.D. Wash. Nov. 1, 2006) 20, 22

Lockett v. Ohio,
438 U.S. 586 (1978) 16

Mackey v. United States,
401 U.S. 667 (1971) 24, 26

Maynard v. Cartwright,
486 U.S. 356 (1988) 16

Mullaney v. Wilbur,
421 U.S. 684 (1975) 20, 25

Penry v. Lynaugh,
492 U.S. 302 (1989) 16, 19

Ring v. Arizona,
536 U.S. 584 (2002) 23, 24

TABLE OF AUTHORITIES
(Continued)

Page

Schardt v. Payne,
414 F.3d 1025 (9th Cir. 2005) 22

Schriro v. Summerlin,
542 U.S. 348 (2004) 19, 23, 24

Stringer v. Black,
503 U.S. 222 (1992) 16

Teague v. Lane,
489 U.S. 288 (1989) ..... *passim*

Tyler v. Cain,
533 U.S. 656 (2001) 24

United States v. Booker,
543 U.S. 220 (2005) ..... *passim*

United States v. Johnson,
457 U.S. 537 (1982) 21

United States v. Koch,
383 F.3d 436 (6th Cir. 2004) 14

United States v. Cruz,
423 F.3d 1119 (9th Cir. 2005) 22

Washington v. Recuenco,
126 S. Ct. 2546 (2006) 20

In re Winship,
397 U.S. 358 (1970) 20, 25

STATE CASES

Smart v. State,
146 P.3d 15 (Alaska 2006) 15

State v. Gomez,
163 S.W.3d 632 (Tenn. 2005) 12, 13, 14, 15

State v. Gould,
271 Kan. 394, 23 P.3d 801 (2001) 17

TABLE OF AUTHORITIES
(Continued)

Page

State v. Jordan,
126 Ariz. 283 (1980), *cert. denied*,
449 U.S. 986 (1980) 23

FEDERAL STATUTES

U.S. Const. amend. V 1

U.S. Const. amend. VI 2

21 U.S.C. § 841(a)(1) 2, 9

21 U.S.C. § 841(b)(1)(A)(iii) 2, 9

21 U.S.C. § 846 2

21 U.S.C. § 960(a)(1) 4

21 U.S.C. § 960(b)(2)(B) 4

OTHER AUTHORITIES

Nicholas J. Eichenseer, *Comment, Reasonable Doubt in the Rear-View Mirror: The Case for Blakely-Booker Retroactivity in the Federal System*,
2005 Wis. L. Rev. 1137 (2005) ..... *passim*

Rethinking Retroactivity,
118 Harv. L. Rev. 1642 (2004) 25, 26

Federal Sentencing Guidelines Manual § 2D1.1(4)
(May 1, 2000) 4

Federal Sentencing Guidelines Manual § 5.A
(May 1, 2000) 3

Cetewayo Askia Briggs respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS AND ORDERS BELOW

The August 31, 2000 Judgment in a Criminal Case of the United States District Court for the Western District of Michigan is unreported and is reproduced in the appendix hereto ("Pet. App.") at 28a. The December 12, 2001 opinion of the United States Court of Appeals for the Sixth Circuit is reported at 27 F. App'x 547 and reproduced at Pet. App. 19a. The April 15, 2002 denial by this Court of a petition for writ of certiorari is reported at 535 U.S. 1011 and reproduced at Pet. App. 18a. The January 7, 2004 Opinion and Order of the United States District Court for the Western District of Michigan is unreported and is reproduced at Pet. App. 13a. The June 30, 2006 opinion of the Sixth Circuit is reported at 187 F. App'x 540 and is reproduced at Pet. App. 2a. The October 31, 2006 denial by the Sixth Circuit of rehearing *en banc* is unreported and is reproduced at Pet. App. 1a.

JURISDICTION

The Sixth Circuit entered judgment on June 30, 2006. Pet. App. 2a. On October 31, 2006, the Sixth Circuit denied a timely filed petition for rehearing or rehearing *en banc*. Pet. App. 1a. The jurisdiction of the Sixth Circuit was invoked pursuant to 28 U.S.C. § 1291. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides, in pertinent part: "No person shall be . . . deprived of life, liberty, or property without due process of law . . . ." U.S. Const. amend. V.

The Sixth Amendment to the Constitution provides, in pertinent part: "In all criminal prosecutions, the accused

shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. Const. amend. VI.

STATEMENT OF THE CASE

The District Court increased Petitioner's sentence pursuant to the federal sentencing guidelines solely because the court found certain additional facts, by a preponderance of the evidence, that had not been admitted by Petitioner or proven to a jury beyond a reasonable doubt. If those events occurred today, an appellate court would be required to invalidate the sentence under this Court's holding in *United States v. Booker*. Petitioner seeks retroactive application of the *Booker* holding to his case, which currently is on collateral review.

On January 11, 2000, a grand jury charged Cetewayo Askia Briggs with conspiring to manufacture and manufacturing cocaine base in violation of 21 U.S.C. §§ 846 and 841(a)(1). Pet. App. 47-48a. The indictment did not specify the quantity of cocaine base involved.[1]

On March 21, 2000, a jury convicted Petitioner of both counts. The jury made no determination as to the quantity of cocaine base at issue. Instead, the District Court instructed the jury not to make a quantity determination:

> The government is not required to prove that the defendant conspired to manufacture or manufactured any particular amount of cocaine base. Quantity is not an element of these offenses.

Pet. App. 45a. The jury's verdict form similarly did not specify the quantity of drugs involved. Pet. App. 46a.

---

[1] The text following Counts One and Two on the indictment lists "21 U.S.C. § 841(b)(1)(A)(iii)." Pet. App. 47-48a. Section 841(b)(a)(A)(iii) specifies penalties for a violation of 21 U.S.C. § 841(a)(1) involving at least 50 grams of cocaine base.

Before Petitioner's sentencing hearing, this Court decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and held that any fact (other than a prior conviction) that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Id.* at 490.

During his sentencing hearing on August 23, 2000, Petitioner argued that *Apprendi* prohibited the District Court from sentencing him to a term of incarceration longer than 20 years – the maximum penalty available under section 841(a)(1) without a finding as to quantity of drugs involved. Pet. App. 41a. Petitioner also argued that *Apprendi* prohibited the District Court from determining quantity by a preponderance of the evidence. *Id.* The District Court disagreed:

> This Court finds that because the Sixth Circuit instruction was followed, which this Court had no alternative but to do, therefore, the jury did not have before it the quantity determination. And the quantity determination under existing law is to, by a preponderance of the evidence, conclude from a trial transcript, from a guilty plea taking, from other sources, many times witnesses called, the aggregate amount that can be fairly attributable to a defendant in a conspiracy.

Pet. App. 41-42a.

Using this rationale, the District Court determined based on a preponderance of the evidence that Petitioner's crimes involved at least 3 kilograms of cocaine base. Pet. App. 42a. The District Court calculated Petitioner's base offense level under the federal sentencing guidelines as 38. *Id.* at 43a. The applicable penalty range under the guidelines demanded a term of incarceration of 235 to 293 months. Federal Sentencing Guidelines Manual (hereinafter "USSG") § 5.A

(May 1, 2000). Without the District Court's quantity determination, Petitioner's maximum sentence under the guidelines would have been 151 months' imprisonment.[2]

On August 23, 2000, the District Court sentenced Petitioner to 240 months' imprisonment, the statutory maximum. Pet. App. 29a. The District Court believed that *Apprendi* foreclosed a judge-made factual finding only if it led to a sentence exceeding the statutory maximum. Pet. App. 42a. The District Court did not, however, consider the effect its factual finding had on the calculation of Petitioner's sentence. Without its factual finding, the maximum sentence the District Court could have imposed under the then-mandatory federal sentencing guidelines was 151 months' imprisonment. USSG § 2D1.1(4). Because of the District Court's quantity determination, however, Petitioner received a prison term over seven years longer than he otherwise would have under the guidelines.

On December 12, 2001, the Sixth Circuit affirmed Petitioner's conviction. Pet. App. 19a. Among other things, the Sixth Circuit determined that because Petitioner's sentence did not exceed 20 years, the statutory maximum under "21 U.S.C. § 960(b)(2)(B),"[3] it did not violate *Apprendi*. Pet. App. 27a. The Sixth Circuit's opinion made no mention of the federal sentencing guidelines.

Petitioner petitioned this Court for a writ of certiorari, which was denied on April 15, 2002. Pet. App. 18a.

---

[2] Violations of 21 U.S.C. § 841(a)(1) involving at least 50 grams of cocaine base required a base offense level of 32, USSG § 2D1.1(4), carrying a punishment range of 121-151 months' imprisonment.

[3] The Sixth Circuit listed "§ 960(b)(2)(B)" as the applicable penalty provision. Pet. App. 27a. The penalties found in section 960(b)(2)(B) apply only to violations of 21 U.S.C. §§ 952, 953, 955, 957, and 959, none of which apply to Petitioner's case. 21 U.S.C. § 960(a)(1).

Petitioner, acting pro se, filed a timely motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. Motion to Vacate, Set Aside, or Correct Sentence, Briggs v. United States, No. 03-cv-00215-RHB (W.D. Mich. Mar. 31, 2003). Petitioner contended his conviction and sentence violated his rights under the Fifth and Sixth Amendments. *Id.* at 2. The District Court denied Petitioner's motion on January 7, 2004. Pet. App. 13a.

On June 24, 2004, this Court decided *Blakely v. Washington*, 542 U.S. 296 (2004), and applied *Apprendi*'s holding to Washington's determinate sentencing scheme. The Court held "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Id.* at 303 (emphasis in original).

On January 11, 2005, the Sixth Circuit granted Petitioner a certificate of appealability on: (1) whether trial counsel rendered ineffective assistance; and (2) whether Petitioner's sentence was illegal in light of *Blakely*. Pet. App. 38-39a.

On January 12, 2005, this Court decided *United States v. Booker*, 543 U.S. 220 (2005), and, using the reasoning set forth in *Blakely*, confirmed that *Apprendi*'s holding applied to sentences decided under the federal sentencing guidelines. The Court's holding impacted all cases then pending on direct review. *Id.* at 245.

On June 30, 2006, the Sixth Circuit, following its prior decision in *Humphress v. United States*, 398 F.3d 855 (6th Cir. 2005) (holding that *Booker* does not apply retroactively to cases already final on direct review), affirmed the District Court's denial of Petitioner's § 2255 claims. Pet. App. 2a. While Petitioner acknowledged the *Humphress* authority in his Sixth Circuit appeal, he preserved the issue of *Booker*'s retroactivity for review by this Court. Final Brief for Appellant Cetewayo Askia Briggs at 3 n.1, Briggs v. United States, No. 04-1315 (6th Cir. Aug. 1, 2005).

Petitioner requested *en banc* review of the panel's decision, and, on October 31, 2006, the Sixth Circuit denied that request. Pet. App. 1a. Petitioner now seeks relief from the Sixth Circuit's ruling.

REASONS FOR GRANTING THE WRIT

This case presents an appropriate vehicle to adjudicate an issue that this Court found necessary, but unable, to address in *Burton v. Stewart,* 127 S. Ct. 793 (2007). In *Burton*, this Court granted certiorari to determine whether *Blakely v. Washington,* 542 U.S. 296 (2004), the state-law analogue to *United States v. Booker*, 543 U.S. 220 (2005), announced a new rule, and if so, whether it applies retroactively. This Court dismissed *Burton* without reaching the merits, however, because the district court lacked jurisdiction to entertain the underlying petition. This case again presents the question of retroactivity, here, of the closely-related *Booker* decision. The question is of crucial importance to thousands of prisoners nationwide. Conflicting decisions among state supreme courts and federal courts of appeals reflect confusion over whether the Court's holding in *Booker* announced a new rule and, if it did, whether it applies retroactively to cases on collateral review.

I. THIS COURT SHOULD RESOLVE THE IMPORTANT ISSUE OF, AND SPLIT OF AUTHORITY OVER, WHETHER *BOOKER* ANNOUNCED A NEW RULE.

Booker's holding is rooted in this Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In *Apprendi*, the Court affirmed and expanded the rule originally expressed in *Jones v. United States*, 526 U.S. 227 (1999): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. The Court considered New Jersey's sentencing scheme that allowed imposition of "sentence enhancements" of up to 20

years if the judge determined by a preponderance of the evidence that the defendant "acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." *Id.* at 468-69 (quoting N.J. Stat. Ann. § 2C:44-3(e) (2000)). The Court ruled that New Jersey's sentencing scheme violated the defendant's Sixth and Fourteenth Amendment rights. While allowing judicial discretion to impose sentences *within* the range proscribed by statute, *id.* at 481, the Court held that judicial fact-finding violated the Constitution when it increased a defendant's maximum sentence. The Court explained that, "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id.* at 494.[4]

The Court noted its holding implicated two constitutional rights: the right to due process of law guaranteed by the Fifth and Fourteenth Amendments, and the right to trial by jury guaranteed by the Sixth Amendment. *Apprendi*, 530 U.S. at 476-77. Due process concerns demanded that facts increasing a defendant's sentence be determined beyond a reasonable doubt. *Id.* at 478. Sixth Amendment concerns demanded that facts increasing a defendant's sentence be proved to a jury. *Id.* at 477. Finally, the Court dismissed the notion of any constitutional distinction between an "element" of an offense and a "sentencing factor." *Id.* at 478. However termed, any fact that had the effect of increasing a defendant's punishment must be proved to a jury beyond a reasonable doubt.

---

[4] *See also id.* at 498 (Scalia, J., concurring) ("But the criminal will never get *more* punishment than he bargained for when he did the crime, and his guilt of the crime (and hence the length of the sentence to which he is exposed) will be determined *beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens*.") (emphasis in original).

In *Blakely v. Washington,* 542 U.S. 296 (2004), *reh'g denied,* 542 U.S. 961 (2004), the Court applied *Apprendi*'s holding to Washington's sentencing scheme that allowed the judge to impose a sentence above the standard range if he found "substantial and compelling reasons." *Id.* at 299. In *Blakely*, the standard sentencing range for second-degree kidnapping with a firearm was 49 to 53 months' incarceration. *Id.* The petitioner entered into a plea agreement and admitted only the elements of the charged offenses. *Id.* At sentencing, however, the judge imposed an exceptional sentence of 90 months based upon his finding that the petitioner acted with "deliberate cruelty." *Id.* at 300.

On certiorari to this Court, Justice Scalia stated: "This case requires us to apply the rule we expressed in *Apprendi v. New Jersey*." *Blakely*, 542 U.S. at 301. After applying *Apprendi*'s rule, the Court reversed. Central to *Blakely*'s holding was the Court's explanation of how to define "statutory maximum" in the *Apprendi* context: "Our precedents make clear, however, that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Id.* at 303-04 (emphasis in original) (internal citations omitted). Because the petitioner in *Blakely* had not admitted to acting with "deliberate cruelty," nor had that fact been found beyond a reasonable doubt by a jury, the sentencing judge could not impose a greater sentence on him than the 53 months allowed by the standard sentencing range.

With *United States v. Booker*, 543 U.S. 220 (2005), this Court extended *Blakely* and applied the rule announced in *Apprendi* to the federal sentencing guidelines. In *Booker*, the petitioner was convicted by a jury of possessing with intent

to distribute at least 50 grams of cocaine base in violation of 21 U.S.C. § 841(a)(1) (the same statutory offense at issue in Petitioner's case), carrying a potential sentence of life imprisonment under 21 U.S.C. § 841(b)(1)(A)(iii). *Booker*, 543 U.S. at 227. Under the facts as found by the jury, the federal sentencing guidelines mandated a base offense level of 32 and a sentencing range of 210-262 months. *Id.* at 235. At sentencing, however, the judge determined by a preponderance of the evidence that the petitioner possessed an additional 566 grams of cocaine base. *Id.* Based on the judge's additional finding, the sentencing guidelines mandated a sentence between 360 months and life imprisonment. *Id.* at 227.

This Court held that Booker's increased maximum sentence was unconstitutional. Using the same analysis as in *Blakely*, the Court "reaffirm[ed its] holding in *Apprendi*" and held that, "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Booker*, 543 U.S. at 244. As with *Blakely*, Booker's "statutory maximum" was the highest sentence in the range mandated by the federal sentencing guidelines, not the highest sentence that could be imposed by statute. *Id.* at 235. Instead of striking down the federal sentencing guidelines as completely unconstitutional, however, the Court excised provisions making the guidelines binding on judges – rendering the guidelines advisory instead of mandatory. *Id.* at 245.

The Court's recent opinion in *Cunningham v. California*, 549 U.S. __ (2007) (slip op.), further underscores the significance of *Booker* and *Blakely*. In *Cunningham*, Justice Ginsburg explained that California's determinate sentencing law ("DSL"), which permitted a trial judge to find facts by a preponderance of the evidence that exposed a defendant to an elevated "upper term" sentence, violated the petitioner's

constitutional rights. *Id.* at __. The Court reiterated its "longstanding common-law practice" and "explicit statement in our [recent] decisions" that any fact exposing a defendant to a greater sentence must be proved to a jury beyond a reasonable doubt. *Id.* at __. After applying the reasoning from *Booker,* the Court held that the determinate nature of California's DSL rendered the petitioner's sentence unconstitutional. The Court also rejected the notion that California's system was merely an "advisory" system granting judges discretion to select a sentence within a given range, *see id.* at __ (Alito, J., dissenting); instead, the system mandated increased sentences. Because California's DSL mandated elevated sentences on the basis of judicial findings of fact by a preponderance of the evidence, the system could not stand. *Id.* at __.

A. This Court Recognized The Importance Of Determining Whether *Booker* (and *Blakely*) Apply Retroactively By Granting Certiorari In *Burton v. Stewart.*

Both *Booker* and *Blakely* involved challenges to a sentence on direct appeal, and this Court has yet to rule on whether either or both of those holdings apply retroactively to sentences on collateral review. The Court granted certiorari in *Burton v. Stewart*, 127 S. Ct. 793 (2007), because *Burton* posed a fundamental question: Did the decision in *Blakely* announce a "new" rule, and if so, does *Blakely* apply retroactively? *Burton* arose, at least in part, due to conflicts among the lower courts of appeals over whether *Blakely* should apply retroactively.

A decision on the merits in *Burton* could have impacted hundreds of prisoners nationwide, and it would have dispelled confusion among the lower courts over whether *Blakely* and *Booker* apply retroactively. The Court's decision in *Burton* did not reach the question of retroactivity, however, because of jurisdictional error in the lower courts. The District Court in *Burton* lacked jurisdiction to entertain

Burton's habeas petition because of his filing of a "second or successive" petition without seeking or obtaining authorization from the Court of Appeals. *Burton*, 127 S. Ct. at 796. This Court ultimately dismissed the petition without issuing any ruling on its retroactivity questions. *Id.* at 799. As a consequence, *Burton*'s important questions remain unanswered.

This case presents an opportunity to determine the retroactivity of the similarly-reasoned, and equally-important, *Booker* decision. As this Court has recognized, *Blakely* and *Booker* are similar in many respects. *See Booker,* 543 U.S. at 233, 235 ("[T]here is no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue in that case."); *Cunningham*, 549 U.S. at __ (applying "both parts of the Court's *Booker* opinion" to California's DSL). Both cases involved mandatory sentencing schemes, and *Apprendi*'s holding provided the foundation for both decisions: a due process right to determination beyond a reasonable doubt of facts increasing a defendant's sentence over the prescribed "statutory maximum," and a Sixth Amendment right to have those facts determined by the jury. *Apprendi*, 530 U.S. at 476-77, 491-92. *Blakely* explained that the phrase "statutory maximum" encompasses not only the maximum penalty written into criminal statutes by the legislature but also the maximum a judge could lawfully impose under the applicable determinate sentencing guidelines. *Blakely*, 542 U.S. at 303. *Booker* applied similar reasoning to the federal sentencing guidelines. *See also Cunningham,* 549 U.S. at __ ("reaffirming" and "applying" *Apprendi*). As a consequence, both *Blakely* and *Booker* stand for the same constitutional principle. *See* Nicholas J. Eichenseer, Comment, *Reasonable Doubt in the Rear-View Mirror: The Case for* Blakely-Booker *Retroactivity in the Federal System*, 2005 Wis. L. Rev. 1137, 1143 (2005) (hereinafter "Eichenseer"). A ruling here on the important issue of *Booker*'s retroactivity will necessarily provide

guidance to the lower courts on the issue of *Blakely*'s retroactivity as well.[5]

B. Courts Are Divided Over The Issue Of Whether *Booker* Announced A New Rule.

A split of authority has opened among courts over whether *Booker* and *Blakely* articulated a "new" rule, or rather were dictated by *Apprendi*. The Court should grant certiorari to resolve whether *Booker* announced a new rule.

In *State v. Gomez*, 163 S.W.3d 632 (Tenn. 2005), *reh'g denied*, 163 S.W.3d 632 (Tenn. 2005), the Supreme Court of Tennessee determined that the Court's holdings in *Blakely* and *Booker* were dictated by *Apprendi*. The defendants in *Gomez* were sentenced based on enhancement factors found by a judge by a preponderance of the evidence. *Id.* at 648. While their case was pending on direct appeal, the Court decided *Blakely*, and the defendants argued that the *Blakely* decision mandated reversal. The Supreme Court of Tennessee began its analysis by considering whether *Blakely* and *Booker* announced "new" rules:

> First, we are of the opinion that *Blakely* did not announce a new rule. Admittedly, the United States Supreme Court has not squarely addressed this issue. However, the Court has suggested that *Blakely* was applying a previously recognized principle of law, rather than announcing a new rule. For example, in *United States v. Booker*, the Court at the outset refers to 'our *Apprendi* line of cases,' making it clear that *Apprendi*, not *Blakely*, established the operative rule of law . . . . Thus, the language of *Booker* demonstrates that the

---

[5] Given that *Blakely* and *Booker* flow equally from *Apprendi* and stand for the same constitutional principles, there is no reason why the Court's decision in this case would not also guide the lower courts in determining *Blakely*'s retroactivity.

> United States Supreme Court does not regard *Blakely* as having announced a new rule of law.

Id. at 649-50 (internal citations omitted).[6]

The Supreme Court of Tennessee also distinguished the "old" constitutional rule of *Apprendi*, which was applied and extended by *Booker*, from the "new" statute-specific rules of *Booker*. *Id.* at 650 n.14. According to the court, *Booker*'s core is an "old" rule dictated by *Apprendi*: any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Booker*'s new rules address the remedial provisions of those decisions, such as those excising the mandatory sections of the federal sentencing guidelines:

> In our view, the new rule of *Booker* was the Court's holding that the Federal Sentencing Guidelines violated the Sixth Amendment, the Court's excision of the mandatory portions of the Guidelines, and the Court's application of the excised Guidelines. *See Humphress v. United States*, 398 F.3d 855, 861 (6th Cir. 2005). The Sixth Amendment principle necessitating the Court's holding was not new and was the same principle discussed in *Jones v. United States*, 526 U.S. 227, 119

---

[6] Despite its determination that *Blakely* and *Booker* did not announce new rules, the Supreme Court of Tennessee refused to grant defendants any relief. The court reasoned that because their case arose on direct review, defendants were required to preserve their constitutional claims of error in order to assert plenary application of *Blakely*. *Gomez*, 163 S.W.3d at 651. Reviewing instead for plain error, the court concluded that the Tennessee laws allowing judicial findings of fact did not affect the *range* of punishment to which a defendant was exposed. *Id.* at 659-60. Without a mandatory increase of maximum punishment, the court found no conflict with this Court's *Blakely* and *Booker* decisions. *Id.* at 661.

S.Ct. 1215, 143 L.Ed.2d 311 (1999) and clearly "expressed in *Apprendi*." *Blakely*, 124 S.Ct. at 2536.

Id.

Gomez is in direct conflict with precedent in the Sixth Circuit. In *Humphress v. United States*, 398 F.3d 855 (6th Cir. 2005), *cert. denied*, 126 S. Ct. 199 (2005), the United States Court of Appeals for the Sixth Circuit held that *Booker* does not apply retroactively to cases on collateral review. The court based the holding in part on its finding that "[t]he *Booker* rule is clearly new." *Humphress*, 398 F.3d at 861. According to the court, *Booker*'s rule was not dictated by existing precedent because the "unlawfulness" of the defendant's conviction was not apparent to all reasonable jurists at the time *Booker* was decided. *Id.* (citing *Beard v. Banks*, 542 U.S. 406, 413 (2004)). The court referred to federal appeals courts that disagreed, at the time, over whether this Court's holding in *Blakely* applied to the federal sentencing guidelines. *Id.* (citing *United States v. Koch*, 383 F.3d 436 (6th Cir. 2004) (en banc)). The court also cited to *Booker*'s quote from *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987), which stated that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases . . . pending on direct review or not yet final . . . ." *Id.* According to the court, *Booker*'s discussion of *Griffith* would have been unnecessary if the rule had been dictated by precedent.

Where, as here, a state court of last resort is in conflict with a United States court of appeals over a question of federal law, it is appropriate for this Court to resolve that conflict. Sup. Ct. R 10; *Hubbard v. United States*, 514 U.S. 695, 720 (1995) (Rehnquist, C.J., dissenting). Indeed, the Supreme Court of Tennessee recognized this Court's important role in resolving conflicts. *Gomez*, 163 S.W.3d at 650 ("[T]he United States Supreme Court is the final arbiter of this issue.").

The conflict among the courts supports the grant of certiorari. On one pole, several states have determined that the rule announced in *Booker* and *Blakely* was dictated by *Apprendi* and therefore entitled to retroactive application. *Gomez*, 163 S.W.3d at 649-50; *Smart v. State*, 146 P.3d 15, 41 (Alaska 2006) (Mannheimer, Judge, concurring). On the other pole, the Sixth Circuit, and other circuits, have declared that *Booker* announced a new rule and does not apply retroactively. *E.g., Humphress*, 398 F.3d at 860; *Guzman v. United States*, 404 F.3d 139, 142 (2d Cir. 2006). Both sides of the debate have ruled without citing to precedent from this Court. The Court should grant certiorari and resolve the disputed question of whether *Booker* announced a new rule.

II. THE DECISION BELOW CONTRAVENES THIS COURT'S PRECEDENT.

The Rule Announced In *Booker* Was Not A New Rule, But Rather Was Dictated By *Apprendi*.

Under the Court's ruling in *Teague v. Lane*, 489 U.S. 288, *reh'g denied*, 490 U.S. 1031 (1989), the determination of whether a constitutional rule of criminal procedure applies retroactively to a case on collateral review[7] involves a three-step process. *Id.* at 310-11; *see also Beard*, 542 U.S. at 411. The court must first determine when the defendant's conviction became final.[8] *Beard*, 542 U.S. at 411. "Second,

---

[7] New rules of criminal procedure generally apply retroactively to cases on direct review or not yet final. *Teague*, 489 U.S. at 304-05.

[8] A federal conviction becomes final when "this Court affirms [the] conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires." *Clay v. United States*, 537 U.S. 522, 527 (2003) (citing *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994)). Petitioner's conviction and sentence became final on April 15, 2002, the date on which this Court denied his petition for a writ of certiorari.

it must ascertain the legal landscape as it then existed and ask whether the Constitution, as interpreted by the precedent then existing, compels the rule. That is, the court must decide whether the rule is actually 'new.'" *Id.* (internal citations and quotation marks omitted). Finally, if the rule is "new," the court must consider whether the rule falls into either of two exceptions to non-retroactivity. *Id.*

As this Court's precedent makes clear, merely applying a rule announced in a prior opinion does not announce a new rule. New rules are those that "brea[k] new ground," *Butler v. McKellar*, 494 U.S. 407, 412 (1990); conversely, applications of "old rules" do not constitute new rules. In *Stringer v. Black*, 503 U.S. 222 (1992), this Court held that its decision in *Maynard v. Cartwright*, 486 U.S. 356 (1988), did not announce a new rule. According to the Court, *Maynard* "applied the same analysis and reasoning" found in *Godfrey v. Georgia*, 446 U.S. 420 (1980). *Stringer*, 503 U.S. at 228. The Court explained: "In applying *Godfrey* to the language before us in *Maynard*, we did not break new ground." *Stringer*, 503 U.S. at 229 (internal quotation marks omitted); *see also Penry v. Lynaugh*, 492 U.S. 302 (1989) (relief sought would not create a new rule because it was dictated by *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982)).

This Court's holdings in *Booker* and *Blakely* are clear applications of the rule announced in *Apprendi*. Both cases stated explicitly that the Court was "applying" the *Apprendi* rule, *Blakely*, 542 U.S. at 301; *Booker*, 543 U.S. at 245,[9] and this Court's more-recent decision reinforced the notion that *Blakely* and *Booker* were "reaffirmations" and "applications" of *Apprendi*'s rule. *Cunningham*, 549 U.S. at __, __ (Alito,

---

[9] *See also Booker*, 543 U.S. at 232 ("For reasons explained in *Jones*, *Apprendi*, and *Ring*, the requirements of the Sixth Amendment were clear.").

J., dissenting). In *Booker*, this Court also recognized its adherence to constitutional principles:

> More important than the language used in our holding in *Apprendi* are the principles we sought to vindicate. Those principles are unquestionably applicable to the Guidelines. They are not the product of recent innovations in our jurisprudence, but rather have their genesis in the ideals our constitutional tradition assimilated from the common law.

Booker, 543 U.S. at 238. *Blakely* and *Booker* applied those principles to the questions presented. *See Booker*, 543 U.S. at 332 (Breyer, J., dissenting in part) ("*Blakely* purports to follow, not to extend, *Apprendi*."); *Cunningham*, 549 U.S. at __ ("We now turn to the instant case in light of both parts of the Court's *Booker* opinion . . . ."). At least one state had already previewed *Blakely* and *Booker* by applying *Apprendi*'s rule to its sentencing guidelines before the *Blakely* decision. *State v. Gould*, 271 Kan. 394, 404-14, 23 P.3d 801, 809 (2001) (vacating sentence decided under Kansas's determinate sentencing guidelines because the guidelines mandated "upward departures" based on judicial fact-finding by a preponderance of the evidence); *Blakely*, 542 U.S. at 309.

Blakely's and *Booker*'s applications of *Apprendi* were necessary because this Court purposely left undecided how its holding would apply to state and federal determinate sentencing schemes. *Apprendi*, 530 U.S. at 550-51 (O'Connor, J., dissenting). Indeed, the dissenters in *Apprendi* recognized its holding "strongly suggest[ed]" that the federal sentencing guidelines were unconstitutional. *Id.* at 524, 551-52 (O'Connor, J., dissenting); *see also id.* at 561-62 (Breyer, J., dissenting). The dissenters in *Blakely* also recognized there was no logical reason not to extend *Apprendi*'s rule to the federal sentencing guidelines. *Blakely*, 542 U.S. at 314, 324 (O'Connor, J., dissenting); *id.* at 346 (Breyer, J., dissenting). When those questions

presented themselves in *Blakely* and *Booker*, this Court resoundingly reaffirmed *Apprendi*'s rule.

Traditional constitutional principles underlying *Apprendi* apply equally to state and federal sentences held unconstitutional in *Blakely* and *Booker*. In each case, fact-finding by twelve of the defendant's peers stood as a bulwark against factual determination by one government appointee. *Cunningham*, 549 U.S. at __ (fact-finding should not be the "bailiwick" of a judge). This Court recognized in *Apprendi* that a judicial finding of fact increasing the maximum punishment appears no different to a defendant than a verdict of guilt as to some greater offense – precisely what the Sixth Amendment protects against. *Blakely* and *Booker* created nothing new. They simply reflected "respect for longstanding precedent," *Blakely*, 542 U.S. at 305, and applied *Apprendi*'s constitutional principles to the specific situations presented.

Because *Booker* did not announce a new rule, the Sixth Circuit erred in following its *Humphress* decision and in holding that *Booker* does not impact cases, like Petitioner's, that are on collateral review. This Court should grant certiorari and reverse the Sixth Circuit's ruling.

A. Even If *Booker* Announced A New Rule, The Sixth Circuit Erred In Holding That It Does Not Apply Retroactively.

1. *Booker* announced a substantive rule falling under the first *Teague* exception.

Under *Teague*, "new" rules of criminal procedure apply retroactively on collateral review if the rule falls under at least one of two exceptions. *Teague*'s bar on retroactivity does not apply to: (1) "rules forbidding punishment 'of certain primary conduct [or to] rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.'" *Beard*, 542 U.S. at 416 (quoting

Penry, 492 U.S. at 330 (1989)); or (2) "watershed" rules of criminal procedure. *Beard*, 542 U.S. at 417. Even if *Booker* announced a new rule, it applies retroactively because it falls under one or both of *Teague*'s exceptions.

Rules falling within *Teague*'s first exception "'are more accurately characterized as substantive rules not subject to [*Teague's*] bar.'" *Beard*, 542 U.S. at 411 n.3 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 352 n.4 (2004)). "New *substantive* rules generally apply retroactively." *Summerlin*, 542 U.S. at 351 (emphasis in original).

The determination of what constitutes a substantive rule versus a procedural one is made by considering the "principal functions of habeas corpus." *Bousley v. United States*, 523 U.S. 614, 620 (1998) (quoting *Teague*, 489 U.S. at 312). In *Summerlin*, this Court provided guidance on what constitutes a substantive rule. Substantive rules include rules that narrow the scope of a criminal statute by interpreting its terms and those "constitutional determinations that place particular conduct or persons . . . beyond the State's power to punish." *Summerlin*, 542 U.S. at 352. Substantive rules are entitled to retroactive application because without their application a defendant is placed in significant risk that he could "face[] a punishment that the law cannot impose on him." *Id.* In addition, "[a] decision that modifies the elements of an offense is normally substantive rather than procedural." *Id.* at 354. These rules are substantive because the "[n]ew elements alter the range of conduct the statute punishes, rendering some formerly unlawful conduct lawful or vice versa." *Id.* In contrast, rules that regulate only the "*manner of determining* the defendant's culpability are procedural." *Id.* at 353 (emphasis in original).

The standard used to determine sentencing factors, which underlies constitutional due process and is at the core of this

Court's holding in *Booker,* is a substantive rule. Stated another way, whether facts[10] are determined beyond a reasonable doubt, as opposed to by a preponderance of the evidence, is a substantive difference. *Kessack v. United States*, No. C05-1828Z, 2006 U.S. Dist. LEXIS 80734, at *12 (W.D. Wash. Nov. 1, 2006).

The Court has consistently reaffirmed the importance of "beyond a reasonable doubt" determinations in criminal prosecutions. *In re Winship*, 397 U.S. 358, 364 (1970); *Mullaney v. Wilbur*, 421 U.S. 684, 704 (1975). "Expressions in many opinions of this Court indicate that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required." *Winship*, 397 U.S. at 362. This high standard of proof safeguards against the possibility that a defendant's fate is incorrectly decided due to fact-finding errors. It stands as "a prime instrument for reducing the risk of convictions resting on factual error." *Winship*, 397 U.S. at 363. This Court's recent opinions continue to underscore the importance of the beyond a reasonable doubt standard. *E.g., Cunningham*, 549 U.S. at __ (facts must be "established beyond a reasonable doubt, not merely by a preponderance of the evidence.").

The "beyond a reasonable doubt" requirement of *Winship* and *Mullaney* is substantive. This Court recognized the substantive nature of the "beyond a reasonable doubt" standard by deciding that both *Winship* and *Mullaney* are entitled to retroactive application. *See Ivan V. v. City of New York*, 407 U.S. 203, 204 (1972) (applying *Winship* retroactively); *Hankerson v. North Carolina*, 432 U.S. 233, 240 (1970) (holding that *Mullaney* applies retroactively);

---

[10] The Court has consistently held that sentencing factors are subject to the same Sixth Amendment scrutiny as the actual elements of a criminal offense. *Washington v. Recuenco*, 126 S. Ct. 2546, 2552 (2006); *Apprendi*, 530 U.S. at 478.

accord United States v. Johnson, 457 U.S. 537, 563 n.21 (1982). As this Court stated in *Ivan V.*:

> Plainly, then, the major purpose of the constitutional standard of proof beyond a reasonable doubt announced in *Winship* was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function, and *Winship* is thus to be given complete retroactive effect.

407 U.S. at 205. *Teague* simply continued the precedent set in *Ivan V.* and *Hankerson* by holding that substantive rules apply retroactively to cases on collateral review. *Beard*, 542 U.S. at 411 n.3.

The rule in *Blakely* and *Booker* is substantive for the same reasons. The Fifth Amendment requirement that facts underlying enhanced punishments be determined beyond a reasonable doubt ensures accuracy of punishments imposed under federal and state sentencing schemes. If one of the "principal functions" of habeas corpus is to ensure "that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted," *Desist v. United States*, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting), then the beyond a reasonable doubt requirement unquestionably serves the principal functions of the Great Writ. *See* Eichensee, 2005 Wis. L. Rev. at 1160-61.

The rule in *Blakely* and *Booker* also "modifie[d] the elements of an offense" by removing the guidelines' mandatory character. Post-*Blakely* and *–Booker*, defendants cannot be punished any more than the facts as determined by a jury beyond a reasonable doubt will allow. Any greater punishment is, in essence, punishment for a different criminal offense since it requires proof of additional facts. "This idea comports with the Court's long-held view that when a fact aggravates or mitigates the primary measure of culpability – punishment – it is an element for *Winship* purposes regardless of how the legislature labels it."

Eichenseer, 2005 Wis. L. Rev. at 1170 (citing *Mullaney*, 421 U.S. at 698-99).

This Court's precedent also shows that the choice between a determination beyond a reasonable doubt or by a preponderance of the evidence is a substantive one. In *Booker*, Justice Thomas recognized that instead of implicating a defendant's Sixth Amendment right to jury trial, the *standard* used to determine punishment implicates due process rights. *Booker*, 543 U.S. at 317, 319 n.6 (Thomas, J., dissenting in part) ("The Fifth Amendment requires proof beyond a reasonable doubt . . . ."). Other courts have reached the same conclusion:

> Schardt and Schriro both address the procedural question of changing the identity of the decisionmaker, not the substantive question of what standard should be used to make the decision. Consequently, neither the Supreme Court in Schriro nor the Ninth Circuit in Schardt and Cruz considers the implications of Blakely under a Fifth Amendment lens.

Kessack, 2006 U.S. Dist. LEXIS 80734, at *12 (citing *Schardt v. Payne*, 414 F.3d 1025 (9th Cir. 2005), and *United States v. Cruz*, 423 F.3d 1119 (9th Cir. 2005)).

Finally, commentary by this Court on the retroactivity of *Booker* and *Blakely* seems to indicate that the rule is a substantive one deserving retroactive application:

> And despite the fact that we hold in *Schriro v. Summerlin*, *ante*, that *Ring* (and *a fortiori Apprendi*) does not apply retroactively on habeas review, all criminal sentences imposed under the federal and state guidelines since *Apprendi* was decided in 2000 arguably remain open to collateral attack.

Blakely, 542 U.S. at 323-24 (O'Connor, J., dissenting) (internal citation omitted).

The only opportunity this Court has had to rule on the retroactivity of a decision like *Booker* was in *Schriro v. Summerlin*. In *Summerlin*, this Court held that the rule announced in *Ring v. Arizona*, 536 U.S. 584 (2002), did not apply retroactively to cases on collateral review. *Ring* held that "a sentencing judge, sitting without a jury, [may not] find an aggravating circumstance necessary for imposition of the death penalty.'" *Summerlin*, 542 U.S. at 353 (quoting *Ring*, 536 U.S. at 609). According to the Court, "*Ring*'s holding is properly classified as procedural." *Summerlin*, 542 U.S. at 353.

However, *Ring*, and by extension *Summerlin*, did not implicate the important substantive determination of *how* the fact-finder decides. The sentencing judge in *Ring* determined aggravating factors beyond a reasonable doubt. *Summerlin*, 542 U.S. at 351 n.1 (citing *State v. Jordan*, 126 Ariz. 283, 286, *cert. denied*, 449 U.S. 986 (1980)). *Summerlin* reserved decision on the key constitutional question presented here: whether the beyond a reasonable doubt requirement requires retroactive application as a substantive rule. *See id.*; Eichenseer, 2005 Wis. L. Rev. at 1159-60.

In this case, the District Court found facts by a preponderance of the evidence, and it used those facts to increase Petitioner's sentence. The Court's decisions in *Winship, Mullaney, Ivan V.*, and *Hankerson* show that determination beyond a reasonable doubt is a substantive difference from determination by a preponderance of the evidence. Overturning the defendant's presumption of innocence requires nothing less. The Sixth Circuit erred in failing to find that, even if *Booker* announced a new rule, it applies retroactively to Petitioner's case. This Court should grant certiorari and reverse.

2. *Booker* announced a watershed rule of criminal procedure.

The second exception in *Teague*'s general bar on retroactivity is for "watershed" rules of criminal procedure. *Teague*, 489 U.S. at 311. "[A] new rule should be applied retroactively if it requires the observance of 'those procedures that . . . are implicit in the concept of ordered liberty.'" *Id.* (quoting *Mackey v. United States*, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part)). Watershed rules are those that both "assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted," *Teague,* 489 U.S. at 312 (quoting *Desist*, 394 U.S. at 262 (Harlan, J., dissenting)) (internal quotation marks omitted), and "alter our understanding of the *bedrock procedural elements* that . . . vitiate the fairness of a particular conviction." *Id.* at 311 (quoting *Mackey*, 401 U.S. at 693-94 (Harlan, J., concurring in the judgments in part and dissenting in part)); *accord Tyler v. Cain*, 533 U.S. 656, 665 (2001). *Booker*'s application of *Apprendi* to the federal sentencing guidelines is a watershed rule, and it deserves retroactive application.

Booker's holding encompasses two key, inextricable, prohibitions: (1) facts increasing a defendant's maximum sentence cannot be determined by the court alone, implicating a defendant's Sixth Amendment rights; and (2) those facts must be proved beyond a reasonable doubt, implicating a defendant's Fifth Amendment rights. *See Apprendi*, 530 U.S. at 476-77, 497. Those two rights in combination require *Booker*'s retroactive application. Absent the protections granted through the holding in *Booker*, defendants could be sentenced to vastly increased sentences due to judicial fact-finding and/or facts proved to a standard less than beyond a reasonable doubt. *See Summerlin*, 542 U.S. at 358-59 (Breyer, J., dissenting) (internal citation omitted) ("In *Ring v. Arizona*, this Court

held that a jury, not a judge, must make the findings necessary to qualify a person for punishment by death. In my view, that holding amounts to a 'watershed' procedural ruling . . . .''). The Fifth and Sixth Amendment rights protected in *Booker* are equally important as the right to counsel protected in *Gideon v. Wainwright*, 372 U.S. 335 (1963), which this Court has identified as a watershed rule. *Beard*, 542 U.S. at 417-18.

Each constitutional right implicated in *Booker* is entitled to primacy on its own. Proof beyond a reasonable doubt is one of the most deeply-entrenched protections in American criminal law. *E.g., Winship*, 397 U.S. at 370 (proof beyond a reasonable doubt is the Constitution's "instruct[ion to] the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions . . . ."); *Mullaney*, 421 U.S. at 704; *Apprendi*, 530 U.S. at 490. The Sixth Amendment right to jury trial is similarly entrenched in American jurisprudence. *Duncan v. Louisiana*, 391 U.S. 145, 149-51 (1968) (the jury trial right is "fundamental to the American scheme of justice.").

Given their individual importances, the combination of Fifth and Sixth Amendment implications in *Booker* clearly rises to "watershed" status. This Court's refusal to grant retroactive status to *Ring* implicated only the jury trial right; the defendant's due process rights were not before the Court. *Booker* is different.

In *Booker*, this Court made clear that *both* the Fifth and Sixth Amendment rights required extension of *Apprendi*'s rule. Those rights in combination make *Booker* deserving of retroactive application. *See* Note, *Rethinking Retroactivity*, 118 Harv. L. Rev. 1642, 1663 (2004) ("[T]he *Summerlin* Court's near-exclusive emphasis on considerations of accuracy strongly suggests that the *Winship* right guaranteed in *Apprendi* should survive the Court's retroactivity analysis [ ] [b]ecause only *Apprendi's* reasonable doubt guarantee unambiguously improves the accuracy of underlying

criminal proceedings . . . ."). Significantly, this Court recently re-affirmed *Booker*'s importance by using its rule to analyze the California system at issue in *Cunningham*.

The circumstances in this case are precisely what the Court was trying to guard against with *Apprendi* and *Booker*. Had the District Court not made its preponderance of the evidence finding, Petitioner would have received a sentence at least seven years shorter. Given the enormity of difference between sitting in prison and residing at home, it seems unsatisfactory that the only distinction of consequence appears to be "the date on which [the defendant was] convicted and sentenced." Eichenseer, 2005 Wis. L. Rev. at 1180. By any standard, depriving a defendant of his liberty under a set of procedures that this Court now holds as unconstitutional offends due process. It is "implicit in the concept of ordered liberty" that the facts underlying Petitioner's sentence should have been proved to a jury beyond a reasonable doubt. *See Mackey*, 401 U.S. at 692; *Rethinking Retroactivity*, 118 Harv. L. Rev. at 1664. The Constitution guarantees as much. *Booker*'s rule is of watershed importance to criminal defendants, and the Sixth Circuit erred in failing to apply it retroactively to Petitioner's case. For this reason, too, the Court should grant certiorari and reverse.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOHN Q. LEWIS*
WILLIAM BLAISE WARREN
JONES DAY
901 Lakeside Avenue
Cleveland, OH 44114
(216) 586-3939

Counsel for Petitioner

* *Counsel of Record*

January 29, 2007

APPENDIX

Case No: 04-1315

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

CETEWAYO ASKIA-BRIGGS,
Petitioner-Appellant,

Filed: October 31, 2006

v.

ORDER

UNITED STATES OF AMERICA,
Respondent-Appellee.

BEFORE: NORRIS and BATCHELDER, Circuit Judges; and RICE*, District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active** judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. According, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

---

* Hon. Walter H. Rice, Senior United District Judge for the Southern District of Ohio, sitting by designation.

** Judge Sutton recused himself from participation in this ruling.

United States Court of Appeals, Sixth Circuit.

Cetewayo Askia BRIGGS,
Petitioner-Appellant,
v.
UNITED STATES of America,
Respondent-Appellee.
No. 04-1315.

Filed: June 30, 2006.

On Appeal from the United States District Court for the Western District of Michigan.

BEFORE: NORRIS and BATCHELDER, Circuit Judges; RICE*, District Judge.

ALICE M. BATCHELDER, Circuit Judge.

Petitioner-Appellant Cetewayo Askia Briggs appeals the district court's denial of his motion to vacate sentence pursuant to 28 U.S.C. § 2255, arguing that he was entitled to an evidentiary hearing to show that his trial counsel was constitutionally ineffective in not properly counseling him to plead guilty rather than proceed to trial. Because the district court possessed sufficient information to find that Briggs's trial counsel was not ineffective under the standard of *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), it did not abuse its discretion by refusing to hold an evidentiary hearing on the issue, and we affirm.

BACKGROUND

A jury convicted Briggs of conspiracy to manufacture cocaine base in violation of 21 U.S.C. § § 841(a)(1) and

---

* The Honorable Walter H. Rice, United States District Judge for the Southern District of Ohio, sitting by designation.

846, and of manufacturing cocaine base in violation of 21 U.S.C. § 841(a)(1). The district court sentenced Briggs to, *inter alia,* 240 months' imprisonment, below the applicable guidelines range, but at the statutory maximum for his convictions. After exhausting his direct appeals, Briggs filed a motion to vacate sentence in the district court pursuant to 28 U.S.C. § 2255, in which he made two arguments that he had received ineffective assistance of counsel at trial that prevented him from making an informed decision as to whether to plead guilty rather than go to trial: first, that his trial counsel improperly assessed the merits of his defense, which left Briggs ignorant of the fact that he would almost certainly be convicted at trial; and second, that counsel did not advise him of the potential sentencing benefits of pleading guilty rather than proceeding to trial. Judge Bell, who presided over Briggs's pre-trial proceedings, trial, sentencing, and § 2255 motion, held that based on the record before him, and in light of his experience with Briggs, Briggs was not entitled to relief or an evidentiary hearing because his ineffective-assistance allegations "are either contradicted by the record or are inherently incredible." We granted a certificate of appealability on the issue of "whether trial counsel rendered ineffective assistance."[1] On appeal, Briggs challenges the denial of his motion to vacate sentence

---

[1] We also granted a certificate of appealability on the issue of "whether [Briggs's] sentence is illegal in light of the Supreme Court's recent decision in *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)." Briggs admits in his brief, however, that the Supreme Court's post-*Blakely* decision in *United States v. Booker,* 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), holding the federal sentencing guidelines in violation of the Sixth Amendment and invalidating their mandatory nature, does not apply to cases on collateral review, such as Briggs's, pursuant to *Humphress v. United States,* 398 F.3d 855 (6th Cir.2005). Because Briggs is clearly foreclosed from having the new rule of *Booker* applied to his case, we need not further address his challenge to the constitutionality of the guidelines.

because of ineffective assistance of counsel, specifically arguing that he should have been afforded an evidentiary hearing to develop factually his argument that his counsel did not provide him constitutionally sufficient advice prior to trial.

ANALYSIS

I. The Applicable Law

A prisoner who moves to vacate his sentence under § 2255 must show that the sentence was imposed in violation of the Constitution or laws of the United States, that the court was without jurisdiction to impose such a sentence, that the sentence was in excess of the maximum authorized by law, or that it is otherwise subject to collateral attack. 28 U.S.C. § 2255. "To prevail under § 2255, [petitioner] must show a 'fundamental defect which inherently results in a complete miscarriage of justice,' or, an error so egregious that it amounts to a violation of due process." *United States v. Ferguson,* 918 F.2d 627, 630 (6th Cir.1990) (quoting *Hill v. United States,* 368 U.S. 424, 428, 82 S.Ct. 468, 7 L.Ed.2d 417 (1962)).

In an action to vacate or correct the sentence, the district court is required to grant a hearing to determine the issues and make findings of fact and conclusions of law "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255. "We have observed that a Section 2255 petitioner's burden for establishing an entitlement to an evidentiary hearing is relatively light." *Smith v. United States,* 348 F.3d 545, 551 (6th Cir.2003) (internal quotation omitted). On the other hand, no evidentiary hearing is required if the petitioner's allegations "cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact." *Arredondo v. United States,* 178 F.3d 778, 782 (6th Cir.1999) (internal quotation omitted). Where, as in the instant case, the judge considering the § 2255 motion also conducted the trial, the

judge may rely on his recollections of the trial. *Blanton v. United States,* 94 F.3d 227, 235 (6th Cir.1996).

To demonstrate ineffective assistance of counsel, a "defendant must show that counsel's performance was deficient [and] ... that the deficient performance prejudiced the defense." *Strickland,* 466 U.S. at 687, 104 S.Ct. 2052. To satisfy this test, a petitioner must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed ... by the Sixth Amendment," and that "counsel's errors were so serious as to deprive [petitioner] of a fair trial, a trial whose result is reliable." *Id.* When a petitioner's ineffective-assistance claim involves a decision whether to plead guilty, in order to demonstrate that he was prejudiced, the petitioner must show a "reasonable probability" that "counsel's constitutionally ineffective performance affected the outcome of the plea process." *Smith,* 348 F.3d at 551 (quoting *Hill v. Lockhart,* 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)).

II. Briggs's *Strickland* Claim Regarding His Trial Counsel's Advice As To The Merits Of The Case

Briggs's first ineffective-assistance argument is that his trial counsel, Craig Frederick (hereinafter, "Attorney Frederick"), was deficient in failing to assess competently the merits of Briggs's ability to obtain an acquittal were he to proceed to trial. Specifically, Briggs contends that Attorney Frederick should have determined prior to trial that important aspects of the testimony of Vonda Harris, Briggs's only witness at trial, would be excluded as hearsay. Harris was supposed to give testimony that would cast doubt upon the testimony of various witnesses who testified, subject to plea bargains of their own, that Briggs cooked cocaine with them. But when Attorney Frederick attempted to elicit this testimony from Harris at trial, the trial judge sustained the prosecutor's objection to the evidence as inadmissible hearsay. Briggs argues that Attorney Frederick should have known that the Federal Rules of Evidence would preclude

such testimony, and that had Briggs known that his only witness would have much of her testimony excluded, he would have recognized that he had no chance of an acquittal and pleaded guilty at a time when he could have garnered a sentence reduction for acceptance of responsibility.

The record was sufficient to permit the district court to review this argument, and the argument was properly rejected by the district court. First, there is no indication that Attorney Frederick's performance was deficient with respect to his handling of Harris. Attorney Frederick's affidavit in the § 2255 proceeding indicates that "[i]t was only through extensive work from [Attorney Frederick] that Ms. Harris even appeared for Mr. Briggs at his trial." Harris herself admitted that she only turned herself in to the police (she had warrants out for her arrest) the day before her testimony, in order to testify on Briggs's behalf, and the record indicates that Attorney Frederick is largely responsible for convincing Harris to do so in aid of his client. Moreover, Attorney Frederick's colloquy with the judge on the morning of the second and final day of trial makes it clear that he did not know, even at that late point in the proceedings, whether Harris would in fact show up to testify, or what exactly she would say on the stand, because she had just turned herself in the previous morning and been released that night. It is therefore not constitutionally deficient performance for Attorney Frederick not to have strategized every aspect of her testimony in advance; he was merely doing the best he could under difficult circumstances. Attorney Frederick was obviously mistaken in thinking he could elicit the testimony in question, but even the district judge himself misinterpreted the applicable hearsay rule according to our court's opinion in Briggs's direct appeal, *see United States v. Briggs*, 27 Fed.Appx. 547, 551 (6th Cir.2001) (unpublished) ("Because a witness need not be a co-conspirator for the statement to be admissible under Rule 801(d), the district court erred in sustaining the prosecutor's objection on the cited basis. We nonetheless find that

Defendant cannot satisfy the foundational requirements of the rule."), so we cannot say that Attorney Frederick's miscalculation constituted an error "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *See Strickland,* 466 U.S. at 687, 104 S.Ct. 2052.

Furthermore, even if Attorney Frederick's performance with regard to Harris were constitutionally deficient, the record before us precludes Briggs from showing that he was prejudiced for *Strickland* purposes: in other words, that there is a reasonable probability that his decision not to plead guilty would have been different had he thought Harris's testimony would not have made it before the jury. The reason for the lack of prejudice is simple: until the final day of trial, it was not at all clear to anyone, including Briggs, that Harris would even be available to testify, which means that in making his decision to go to trial rather than to plead guilty, Briggs could not reasonably have relied upon the admission of any of her testimony. Briggs does not claim that Attorney Frederick misled him from the start into believing that Harris would surely testify on his behalf, thus causing him to forgo pleading guilty; Briggs argues only that his assumption that Attorney Frederick could get Harris's testimony admitted into evidence caused him not to plead guilty. But since the record makes it clear that Briggs could not reasonably have assumed prior to trial that Harris would have been available to testify *at all,* he cannot now reasonably argue that he would have pleaded guilty had he known that portions of Harris's testimony might not be admissible. Briggs therefore cannot satisfy *Strickland*' s prejudice prong as to his argument concerning Attorney Frederick's assessments of the merits of his defense.[2]

---

[2] We also note that some of Harris's impeaching testimony was admitted-she testified that "they were lying on [Briggs]," and that "they lied on

III. Briggs's *Strickland* Claim Based On His Trial Counsel's Advice Concerning The Potential Sentencing Benefits Of Pleading Guilty

Briggs's second ineffective-assistance argument is that Attorney Frederick did not discuss with him the potential sentencing benefits of pleading guilty rather than going to trial. Specifically, Briggs argues that he was never made aware that by pleading guilty he would be eligible for a three-point reduction in his offense level for acceptance of responsibility, U.S.S.G. § 3E1.1 (2000), and a two-point reduction under the safety valve, U.S.S.G. § § 5C1.2, 2D1.1(b)(6) (2000). Briggs notes that these reductions potentially would have lowered his offense level from 38 to 33-from a range of 235-293 months' imprisonment to 135-168 months' imprisonment. Briggs claims that had he known of this disparity, there is a reasonable probability that he would have chosen to plead guilty rather than proceed to trial. With regard to this argument, the district court found that Briggs had "failed to allege a credible claim of ineffective assistance of counsel resulting in [his] decision to proceed to trial rather than plead guilty," and refused even to hold an evidentiary hearing to determine the nature of the pre-trial advice given to Briggs by Attorney Frederick regarding the potential sentencing benefits of pleading guilty. We are convinced that the district court did not abuse its discretion in refusing to hold an evidentiary hearing on this issue.

First, Briggs's argument with regard to the safety valve is a red herring. Eligibility for this reduction requires a defendant "not later than the time of the sentencing hearing" to cooperate with the government by providing information

---

him, and that's wrong"-thus further weakening Briggs's argument that he was prejudiced by Attorney Frederick's handling of Harris.

about the common scheme or plan. U.S.S.G. § 5C1.2(a)(5). In other words, whether Briggs pleaded guilty or was convicted at trial is irrelevant to his eligibility for the safety valve. In fact, though Briggs did proceed to trial and was convicted, he still had five months before the sentencing hearing-during which time he was represented by counsel who had replaced Attorney Frederick-to attempt to meet the requirements for the safety valve, and the district court determined that he had not done so. Therefore, whether Attorney Frederick discussed the safety valve with Briggs is irrelevant because it would not have affected his decision not to plead guilty inasmuch as eligibility for the safety valve has nothing to do with pleading guilty rather than going to trial. Even were we to assume that Attorney Frederick performed deficiently by not informing Briggs of the safety valve, Briggs certainly was not prejudiced under *Strickland.*

That leaves Briggs with the up-to-three-level-acceptance-of-responsibility reduction as his only potentially viable avenue of prejudice as a result of his not having pleaded guilty. Briggs could conceivably have received a three-level reduction under U.S.S.G. § 3E1.1 had he pleaded guilty in a timely manner prior to trial, reducing his offense level from 38 to as low as 35-in other words, from 235-293 months' imprisonment to 168-210 months' imprisonment. In his affidavit, Attorney Frederick swears that he informed Briggs "on numerous occasions about the federal sentencing guidelines, how they work, how they are scored, and how they would likely apply to him," including "discussing possible acceptance of responsibility deductions from his scoring, as well as all other associated potential scoring issues, including roles in the events, safety valve, and other pertinent issues." And Briggs admits that he had a "very brief" discussion with Attorney Frederick concerning pleading guilty during their first meeting. Nonetheless, Attorney Frederick avers, "Briggs was at no time ever willing to admit his guilt or accept any plea offers. Mr. Briggs made it very clear that the amount of time that he

would likely be facing through a plea was unacceptable and he had no interest in accepting a plea offer." Briggs, however, contends now that had he known about possible reductions for acceptance of responsibility and the safety valve, in light of the weakness of his case, there is a reasonable probability he would have chosen to plead guilty rather than proceed to trial.

The district court did not abuse its discretion by rejecting this argument as "inherently incredible" and "contradicted by the record." Because the safety-valve issue is a red herring, Briggs's complaint here is that he was not properly informed of a chance to plead guilty in return for a certain sentence of approximately 14 to 17 years (168-210 months for a 35 offense level) rather than pursuing an acquittal at the risk of the statutory-maximum 20-year sentence he ultimately received. The record before the district court contained Attorney Frederick's affidavit vigorously refuting Briggs's contentions, *see Smith,* 348 F.3d at 553 (under similar circumstances, giving substantial weight to the substance of attorney's affidavit concerning the factual elements of his interactions with his client), and the statements of both defense counsel and counsel for the government at the final pre-trial that Briggs had no interest in entering a plea. In light of that record, it was not an abuse of discretion for the district court to decide, without holding an evidentiary hearing, that Briggs would not have pleaded guilty to crimes that would still have placed him at risk of a 17-year sentence, assuming he received the entire three-point-acceptance-of-responsibility reduction, and a 20-year sentence if he received no such reduction. The district judge's refusal to believe Briggs's current contentions as to his plea proclivities, in the face of Attorney Frederick's averments to the contrary, is further bolstered by that judge's already extensive familiarity with Briggs and the proceedings at issue, and the strong impression he formed of Briggs as being incredible. For example, at the suppression hearing the district judge "found considerable question concerning

the credibility or believability of Mr. Briggs in front of the Court," and at sentencing characterized it as a "close question" whether Briggs had obstructed justice prior to and during trial, adding that "[i]f this Court were to combine some of this nonsense since [trial], the Court might well come to an obstruction [finding]." It was therefore not an abuse of discretion for the district court to determine, based on its experience with Briggs and the record before it, that Attorney Frederick acted competently in his informing Briggs of the potential sentencing benefits of a guilty plea, and that in any event Briggs would not have pleaded guilty under the circumstances.[3]

---

[3] Briggs's reliance upon *Smith v. United States*, 348 F.3d 545 (6th Cir. 2003), does little to help his case. *Smith* involved a defendant who rejected a plea offer of 20 months' imprisonment and ultimately was convicted and sentenced to 262 months' imprisonment. Smith later filed a § 2255 motion complaining that his trial counsel was ineffective in not better explaining the wisdom of accepting the plea offer. The *Smith* court noted, quite reasonably, that "the disparity between the plea offer and the potential sentence exposure [was] strong evidence of a reasonable probability that a properly advised defendant would have accepted a guilty plea offer, despite earlier protestations of innocence." *Id.* at 552. *Smith* therefore held that the district court abused its discretion by not holding an evidentiary hearing to better determine the "nature and quality of the advice Smith received before he made his final decision to reject the government's proposed plea bargain." *Id.* at 553-54. The instant case is starkly different. Briggs was never offered a specific plea bargain by the government, and as the preceding analysis shows, his sentence exposure-even if we assume he would have received a three-point reduction for acceptance of responsibility, but especially viewing that as the open question it would have been at the time of the plea-would have been very close to the same whether or not he pleaded guilty, whereas Smith's ultimate sentence was 13 times that offered by the government in its plea bargain. Moreover, there is no indication in *Smith* that the defendant manifested the pervasive credibility problems in the eyes of the district judge that Briggs did in the instant case.

CONCLUSION

Accordingly, we **AFFIRM** the judgment of the district court finding no ineffective assistance of counsel, and hold that its refusal to conduct an evidentiary hearing was not an abuse of discretion.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CETEWAYO ASKIA BRIGGS,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent. /

Filed: Jan. 7, 2004

File No. 1:03-CV-215

HON. ROBERT HOLMES BELL

OPINION AND ORDER

Before this Court is Movant Cetewayo Askia Briggs' motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. A jury convicted Movant of conspiracy to manufacture cocaine base in violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 846 and of manufacturing cocaine base in violation of 21 U.S.C. § 841(a)(1). This Court sentenced Movant to 240 months of imprisonment, 5 years of supervised release, a $5,420 fine, and a $100 special assessment. In this motion, Movant argues that he was denied effective assistance of counsel. For the following reasons, Movant's motion to vacate, set aside, or correct sentence is DENIED.

A prisoner who moves to vacate his sentence under § 2255 must show that the sentence was imposed in violation of the Constitution or laws of the United States, that the court was without jurisdiction to impose such sentence, that the sentence was in excess of the maximum authorized by law, or that it is otherwise subject to collateral attack. 28 U.S.C. § 2255. In order to obtain collateral relief under § 2255, a movant must clear a significantly higher hurdle than

would exist on direct appeal. *United States v. Frady*, 456 U.S. 152, 166 (1982). "To prevail under § 2255, [movant] must show a 'fundamental defect which inherently results in a complete miscarriage of justice,' or, an error so egregious that it amounts to a violation of due process." *United States v. Ferguson*, 918 F.2d 627, 630 (6th Cir. 1990) (quoting *Hill v. United States*, 368 U.S. 424, 428 (1968)).

In an action to vacate or correct the sentence, the court is required to grant a hearing to determine the issues and make findings of fact and conclusions of law "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255. No evidentiary hearing is required if the movant's allegations "cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact." *Arredondo v. United States*, 178 F.3d 778, 782 (6th Cir. 1999) (quoting *Engelen v. United States*, 68 F.3d 238, 240 (8th Cir. 1995)). Where, as here, the judge considering the § 2255 motion also conducted the trial, the judge may rely on his or her recollections of the trial. *Blanton v. United States*, 94 F.3d 227, 235 (6th Cir. 1996).

Movant alleges that he was denied effective assistance of counsel. To demonstrate ineffective assistance of counsel, a "defendant must show that counsel's performance was deficient [and] . . . that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To satisfy this test, Movant must to show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment" and that "counsel's errors were so serious as to deprive [Movant] of a fair trial, a trial whose result is reliable." *Id.* "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690.

First, Movant contends that his defense counsel was ineffective because Movant alleges that defense counsel did not adequately investigate defense witness Vonda Harris. Movant contends that if Attorney Frederick had properly investigated and prepared the witness, defense counsel would have known her testimony was inadmissible. Movant, however, does not argue that defense counsel's alleged lack of preparation deprived him of a fair trial. Rather, Movant contends that proper preparation would have resulted in no trial because Movant would have pleaded guilty.

Movant's allegation of ineffective assistance fails because Movant is unable to show that defense counsel's lack of preparation was deficient performance. The affidavit of Attorney Frederick states that obtaining Ms. Harris' cooperation was difficult. (Aff. of Frederick ¶5-7.) This is consistent with the record of Movant's trial. Ms. Harris testified at trial that she surrendered to authorities on a two-year-old outstanding arrest warrant, posted bond, and was released at midnight the day before she testified. (R. at 253-254.) In addition, the record indicates that Attorney Frederick had only spoken to Ms. Harris for a few minutes prior to her testifying because she had been unwilling to speak at greater length while she was "on the run." (R. at 237.) The record clearly indicates that Attorney Frederick's inability to investigate Ms. Harris and determine the value and admissibility of her testimony arose from her unavailability, not a failing of counsel. In addition, contrary to Movant's assertions, Ms. Harris' testimony was not entirely excluded. Among other things, Ms. Harris was allowed to testify that "they were lying on" Movant. (R. at 262.) Moreover, because Ms. Harris made herself available to testify only after the trial had begun, it is inherently incredible to contend that prior investigation of Ms. Harris would have affected the decision to proceed to trial. Because Movant has failed to demonstrate that defense counsel's inability to thoroughly investigate Ms. Harris' testimony is

deficient performance, Movant's ineffective assistance of counsel argument cannot succeed.

Second, Movant argues that defense counsel failed to advise him of the benefits of pleading guilty in order to obtain downward departures for acceptance of responsibility and the safety valve. Citing *Boria v. Keane*, 99 F.3d 492 (2nd. Cir. 1996), Movant contends that his attorney was ineffective because, in light of the evidence of Movant's guilt, Movant's attorney did not insist that Movant plead guilty in order to earn a sentencing guideline reduction for acceptance of responsibility and for the "safety valve," U.S.S.G. § 5C1.2. The Sixth Circuit has rejected this assertion as a proper basis upon which to find deficient performance by defense counsel. *See Smith v. United States*, 348 F.3d 545, 552 (6th Cir. 2003). Rather, the *Smith* Court stated that defense counsel's obligation is to fully inform a client of the available options, such as to convey a plea offer, and to fully explain the ranges of penalties under likely guideline scoring scenarios. *Id.* at 552-53.

Movant has failed to allege a credible claim of ineffective assistance of counsel resulting in Movant's decision to proceed to trial rather than plead guilty. First, Movant does not dispute that Movant and his defense counsel engaged in a discussion of plea agreements prior to proceeding with a trial. (Pet'r Reply Br. at 6.) Though there is no evidence that Movant was offered a plea agreement, Movant argues that he should have been urged to plead guilty without the benefit of a plea bargain. The record of Movant's sentencing hearing, however, makes clear that Movant was not willing to make a plea that exposed him to 20 to 25 years of imprisonment. (R. at 32.) Though he may have qualified for a downward departure if he had pleaded guilty, Movant's initial imprisonment exposure with a guilty plea would have been 20 to 25 years.

In addition, Movant's contention that he would have received a downward departure pursuant to U.S.S.G. § 5C1.2

had he pleaded guilty is without merit. Prior to Movant's sentencing, Movant could have qualified for a two-level downward departure in spite of proceeding with a trial. Movant, however, failed to meet the requirements of 18 U.S.C. §3553(f) and U.S.S.G. § 5C1.2. Movant was convicted on March 21, 2000 and sentenced on August 23, 2000. Though Movant had five months in which to make a satisfactory proffer to the Government and Movant had the benefit of retained counsel, of which he does not complain, nearly three months before his sentencing hearing, Movant failed to qualify for the downward departure in question.

The record, excluding former defense counsel's affidavit, indicates that Movant is not entitled to relief on his claims and the affidavit of defense counsel is supported by other evidence in the record. Because Movant's allegations are either contradicted by the record or are inherently incredible, an evidentiary hearing is not warranted. Accordingly,

IT IS HEREBY ORDERED that Movant's motion to vacate, set aside or correct his sentence (Docket # 1) is **DENIED**.

Date: January 7, 2004

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
CHIEF UNITED STATES
DISTRICT JUDGE

Supreme Court of the United States

CETEWAYO ASKIA BRIGGS,
Petitioner,
v.
UNITED STATES.
No. 01-9082.

April 15, 2002.

Case below, 27 Fed. Appx. 547.

Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

United States Court of Appeals, Sixth Circuit.

UNITED STATES of America,
Plaintiff-Appellee,
v.
Cetewayo Askia BRIGGS,
Defendant-Appellant.
No. 00-2012.

Dec. 12, 2001.

On Appeal from the United States District Court for the Western District of Michigan.

Before MARTIN, Chief Judge; CLAY, Circuit Judge; and GARWOOD, Circuit Judge.*

CLAY, Circuit Judge.

Defendant, Cetewayo A. Briggs, appeals from the judgment of conviction and sentence entered by the district court on August 31, 2000, after being found guilty for conspiracy to manufacture cocaine base in violation of 18 U.S.C. § 846 and § 841(a)(1), and manufacture of cocaine base in violation of 18 U.S.C. § 841(a)(1), for which Defendant was sentenced to concurrent terms of 240 months' imprisonment. For the reasons set forth below, we AFFIRM Defendant's judgment of conviction and sentence.

BACKGROUND

Defendant was arrested on the night of October 19, 1999 when law enforcement officers from the City of Muskegon, Michigan stopped him for an outstanding traffic warrant. Defendant, who was the target of a federal drug

---

* The Honorable Will Garwood, Circuit Judge, United States Court of Appeals for the Fifth Circuit, sitting by designation.

investigation, was questioned at the police station about his involvement in cocaine trafficking in Muskegon County. After being advised of his rights under *Miranda v. Arizona,* 384 U.S. 436, 467, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), Defendant admitted to two interrogating police officers that on occasion he had cooked crack cocaine for Stacey Thompson and Alonzo Johnson. At trial, the two police officers gave testimony that Defendant admitted to them that he manufactured cocaine base for Thompson and Johnson. Thompson also provided testimony that one night in the early summer of 1999 he took Defendant to Johnson and Carlos Piggee's apartment to cook about 36 ounces of powder cocaine in order to produce about 60 ounces of crack cocaine for Johnson. Piggee testified that he was present when Defendant cooked the cocaine. Johnson, a crack cocaine dealer since 1997, provided testimony that he paid Defendant for the crack cocaine, but that his primary motivation was to learn Defendant's cooking method, which produced a greater quantity of crack cocaine from powder cocaine than Johnson's own method at the time. On the following night, Johnson and Defendant went to Thompson's house before returning to Johnson and Piggee's apartment where they cooked about two kilograms of powder cocaine, producing approximately three kilograms of crack cocaine, which Johnson later sold. Having learned Defendant's cooking method, Johnson afterwards did not have further occasion to use Defendant to make crack cocaine.

In an indictment filed on January 11, 2000, Defendant was charged along with Johnson with conspiracy to manufacture cocaine base in violation of 18 U.S.C. § 846 and § 841(a)(1), and manufacture of cocaine base in violation of 18 U.S.C. § 841(a)(1). After the district court denied Defendant's motion to suppress his statements to law enforcement officers on March 20, 2000, Defendant was tried by a jury, and convicted of both counts. On August 23, 2000, Defendant was sentenced to concurrent terms of 240

months' imprisonment on each count. Defendant's timely appeal ensued on August 29, 2000.

DISCUSSION

I. Allegations of Prosecutorial Misconduct

Defendant first challenges his convictions on the basis of prosecutorial misconduct, claiming that the prosecutor bolstered and vouched for three government witnesses by referring to their plea agreements during direct examination and rebuttal closing argument. *See United States v. Carroll,* 26 F.3d 1380, 1387-89 (6th Cir.1994) (finding that improper vouching occurs when the prestige and authority of the government are placed behind the witnesses to support their credibility).

Because Defendant failed to object to the prosecutor's comments at trial, we review his claim for plain error. *Id.* at 1383. Plain error is found "only in exceptional circumstances," and only when the error is so plain that "the trial judge and prosecutor were derelict in countenancing it." *Id.* In reviewing claims of prosecutorial misconduct under the plain-error standard, we determine whether the prosecutor's statements were improper, and, if so, whether the impropriety was flagrant. *Id.* at 1384-90. This Court considers four factors in determining flagrancy: (1) whether the remark tended to mislead the jury or prejudiced the defendant; (2) whether it was isolated or extensive; (3) whether it was deliberately or accidentally placed before the jury; and (4) the strength of the evidence against the defendant. *See id.* (quoting *United States v. Leon,* 534 F.2d 667, 678-83 (6th Cir.1976)). If the comment was not flagrant, reversal is proper only when "(i) the proof against the defendant was not overwhelming, (ii) opposing counsel objected to the conduct, and (iii) the district court failed to give a curative instruction." *United States v. Brown,* 66 F.3d 124, 127 (6th Cir.1995) (citing *Carroll,* 26 F.3d. at 1384-90).

Reviewing the prosecutorial remarks in context, we find that Defendant has failed to show that the challenged comments during direct examination and rebuttal closing argument were improper. As a review of the record indicates, the prosecutor elicited testimony during direct examination from three government witnesses, Stacey Thompson, Alonzo Johnson, and Carlos Piggee, regarding their plea agreements. Specifically, the prosecutor introduced Johnson and Thompson's plea agreements into evidence, after eliciting testimony from them regarding the terms of their agreements requiring them to cooperate with the government and to testify truthfully. On cross-examination, defense counsel questioned both Thompson and Johnson regarding their hope for leniency or a sentence reduction and their understanding that they would lose the benefits of their respective plea agreements if they knowingly gave false testimony.

On redirect examination, the prosecutor elicited testimony from Thompson in which he acknowledged his belief that the government would bring additional charges against him if he knowingly testified falsely, but that there was no benefit to him for testifying falsely. Similarly, the prosecutor elicited testimony from Johnson during redirect examination that his sentence reduction was not conditioned upon Defendant being found guilty, that the only thing that mattered was that he told the truth, and that there was no benefit to lying.

Although Defendant claims that the prosecutor elicited testimony from Johnson and Thompson about their plea agreements to improperly bolster or vouch for the truthfulness of these government witnesses, it is readily apparent that the prosecutor merely responded to the defense counsel's cross-examination within the proper scope of re-direct examination. Accordingly, we find that there was no improper vouching during the prosecutor's examination of the government witnesses.

There was also no improper conduct by the prosecutor during rebuttal closing argument. In closing argument, the prosecutor noted the existence of the witnesses' plea agreements, pointing out that they were available to be read in the jury room, while cautioning the jury about the reliability of testimony from witnesses with prior convictions. In contrast, defense counsel's closing argument referred extensively to the plea agreements and the motivation of the government witnesses to lie. Specifically, defense counsel argued that "Each witness up here told you effectively that he's here testifying hoping to get time knocked off" and that they "would literally sell their own mothers to get a deal." Defense counsel also read one-half of paragraph 7 of Piggee's plea agreement stating that the government agreed to use "good faith" in determining whether the witness would receive a sentence reduction.

In rebuttal closing argument, the prosecutor responded to defense counsel's closing argument by informing the jury that the plea agreements were "pretty much the same," reading paragraph seven of Thompson's plea agreement as an example, which stated that the witness had a continuing obligation to cooperate with the government. The prosecutor further stated that "[t]hese people are not here testifying because they chose to do so," but "because they are required to do so." In addition, the prosecutor read the full text of paragraph ten of Thompson's plea agreement, which was identical to paragraph 7 of Piggee's plea agreement. As the prosecutor pointed out to the jury, defense counsel did not read the section of the paragraph stating that the district court had "complete discretion" to determine the sentence reduction. The prosecutor then added that "It doesn't matter whether Mr. Briggs is convicted or not. What matters is that these defendants [sic] tell the truth." The prosecutor, after reading from paragraph 11 of Thompson's plea agreement specifying the consequences of a breach of the agreement, then added: "What do these men have to lose? They have a lot to lose by lying. What do they have to gain if they tell

the truth? They have the possibility of a sentence reduction. Use your common sense, ladies and gentlemen. What do they have to gain by lying?"

To the extent that any conduct by the prosecutor during rebuttal closing argument was improper, it was invited or provoked by defense counsel. *See United States v. Collins,* 78 F.3d 1021, 1040 (6th Cir.1996); *United States v. Sharpe,* 996 F.2d 125, 129 (6th Cir.1993)(finding that a party may not invite error and then complain of it on appeal). Specifically, there is no indication that the prosecutor was putting the full weight of her office behind the credibility of these witnesses in her rebuttal closing argument. Rather, the prosecutor simply countered defense counsel's closing argument suggesting that the witnesses were willing to lie at Defendant's expense to achieve a sentence reduction. Thus, we find that Defendant has failed to show plain error with regard to the prosecutor's conduct at the trial.

II. Admission of Hearsay Evidence under Federal Rules of Evidence 801(d)(2)(E)

Defendant also claims that the district court abused its discretion by not allowing defense counsel to elicit testimony from defense witness, Vonda Harris, one of Johnson's paramours, about what Johnson's relationship was with Defendant. At trial, the prosecutor objected on grounds of hearsay to defense counsel's questioning Harris about this relationship, prompting defense counsel to respond that the testimony was admissible under the co-conspirator statement exception to the hearsay rule under Federal Rule of Evidence 801(d)(2)(E). When the prosecutor argued that "[u]nless Ms. Harris is indicating that she was in fact a co-conspirator, then these [statements] would not be in furtherance of the conspiracy," the district court agreed and sustained the objection.

Federal Rule of Evidence 801(d)(2)(E) provides that "[a] statement is not hearsay if ... [t]he statement is offered against a party and is ... a statement by a co-conspirator of a

party during the course and furtherance of the conspiracy." As pointed out by this Court in *United States v. Maliszewski,* 161 F.3d 992, 1011 (6th Cir. 1998), the offering party must show by a preponderance of the evidence that "(1) a conspiracy existed; (2) the party against whom the statement is offered was a member of the conspiracy; and (3) the statement was made in the course of and in furtherance of the conspiracy."

Because a witness need not be a co-conspirator for the statement to be admissible under Rule 801(d), the district court erred in sustaining the prosecutor's objection on the cited basis. We nonetheless find that Defendant cannot satisfy the foundational requirements of the rule. In particular, Defendant cannot show by a preponderance of the evidence that Johnson's statements made to Harris were being offered against the government, i.e., that the government was a member of the conspiracy. See *Maliszewski,* 161 F.3d. at 1011 ("Here, the government was the party against whom the statement was offered, and we feel confident that Edward does not mean to suggest that the government was a member of the conspiracy. That fact precludes admission.").

III. Application of the Safety Valve Provision

Defendant next claims that the district court erred by failing to consider at his sentencing hearing whether he qualified for the safety valve provision under 18 U.S.C. § 3553(f) and USSG § 5C1.2. Under the safety value provision, the district court is required to ignore the statutory minimum sentences of specified drug-related offenses when (1) the defendant has no more than one criminal history point; (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense; (3) the offense did not result in death or serious injury; (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense; and (5) "not later than the time of the

sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan...." 18 U.S.C. § 3553(f).

At the sentencing hearing, the district court found that the safety valve provision was not applicable, observing that "there has been no acknowledgment or acceptance of responsibility" and that Defendant had not tendered a proffer to the prosecutor. Defendant claims that the district court erred by confusing the "acceptance of responsibility" provision with the safety valve provision and by not permitting him to make a proffer at the time of the sentencing hearing. Although the district court questioned the prosecutor about whether there had been an acknowledgment or acceptance of responsibility, the record clearly indicates that the district court was cognizant of the fact that it was determining whether the safety valve provision of the sentencing guidelines was applicable, not the acceptance of responsibility provision under U.S.S.G. § 3E1.1. Moreover, although Defendant claims that the district court did not provide him with an opportunity to make a proffer during the sentencing hearing, the record conclusively shows that Defendant failed to make such a proffer as to qualify for the safety valve. Inasmuch as Defendant never made a proffer, the district court properly concluded that the safety valve was not triggered. Thus, we find no error.

IV. Alleged Violation of *Apprendi v. New Jersey*

Defendant also argues that he is entitled to a new trial under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) because the district court erred by using the preponderance of the evidence standard in determining the quantity of drugs involved in this case. Because Defendant did not bring the claimed error to the attention of the district court, we review it for plain error.

Fed.R.Crim.P. 52(b). In *Apprendi,* the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *See id.* at 488, 120 S.Ct. 2348. Because Defendant's sentence did not exceed the statutory maximum of 20 years' imprisonment under § 960(b)(2)(B), no *Apprendi* violation has occurred in this case.

CONCLUSION

For the foregoing reasons, we AFFIRM the district court's judgment of conviction and sentence.

United States District Court
Western District of Michigan

UNITED STATES OF AMERICA,

v.

CETEWAYO ASKIA-BRIGGS,

Filed: Aug. 31, 2000

JUDGEMENT IN A CIVIL CASE

(For offenses committed On or After November 1, 1987)

File No. 1:00-CR-10-02

Frank E. Stanley
Defendant's Attorney

THE DEFENDANT:

□ pleaded guilty to Counts **.
x – was found guilty on count(s) 1 and 2 of an Indictment after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense:	Date Offense Concluded	Count Number(s)
21 U.S.C. §§ 846 & 841(a)(1)	Conspiracy to Manufacture Cocaine Base	08/31/99	1
21 U.S.C. § 841(a)(1)	Manufacture Cocaine Base	08/31/99	2

The Defendant is sentenced as provided in pages 2 through ** of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

□ The defendant has been found not guilty on count(s) **, and is discharged as to such count(s).

□ Count(s) ** (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Date of Imposition of Sentence: August 23, 2000

Defendant's Soc. Sec. No.: 379-96-7953
Defendant's Date of Birth: 10/13/1974
US Marshal's No.: 09939-040

Defendant's Address:
15056 Mark Twain Street
Detroit, MI 48227

Dated:

HON. ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **240 months as to Count 1 and 240 months as to Count 2, to be served concurrently.**

x – The Court makes the following recommendations to the Bureau of Prisons:

That the defendant receive intensive substance abuse treatment.

That the defendant be placed in a facility near his family, who presently reside in southeast Michigan.

x – The defendant is remanded to the custody of the United States marshal.

□ The defendant shall surrender to the United States marshal for this district

- □ at ** a.m./p.m. on **.
- □ as notified by the United States marshal.

□ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

- □ before 2 p.m. on **.
- □ as notified by the United States marshal.
- □ as notified by the probation office

RETURN

have executed this judgment as follows:

_____

_____

_____

____ Defendant delivered on ___ to _____

_____, with a certified copy of this judgment.

_____

United States Marshal

By_____

Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **five (5) years as to Count 1 and five (5) years as to Count 2, to be served concurrently.**

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the following additional conditions:

(1) The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

(2) The defendant shall not unlawfully possess a controlled substance and shall refrain from unlawful use of a controlled substance.

(3) The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

(4) The defendant shall not possess a firearm, destructive device, or other dangerous weapon.

(5) The defendant shall notify the probation officer at least 15 days prior to any change in residence in accordance with the Violent Crime Control and Law Enforcement Act of 1994.

(6) The defendant shall submit to one drug test within 15 days after being placed on supervision and at least two periodic tests thereafter within 60 days.

(7) The defendant shall provide the probation officer with access to any requested financial information.

(8) The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer.

(9) The defendant shall participate in a program of testing and treatment for drug abuse, as directed by the probation

officer, until such time as the defendant is released from the program by the probation officer.

(10) The defendant shall not associate with anyone using, possessing, or having been convicted of possessing controlled substances.

(11) The defendant shall be employed full time.

(12) The defendant shall abstain from all use of alcoholic beverages.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer 15 days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

SUPERVISED RELEASE

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$200.00	$5,420.00	$

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties and delinquency pursuant to 18 U.S.C. § 3612(g).

The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

□ The interest requirement is waived.

□ The interest requirement is modified as follows: **

RESTITUTION

□ The determination of restitution is deferred until _____. An amended Judgment in a Criminal Case will be entered after such determination.

□ The defendant shall make restitution to the following payees in the amount listed below. If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage column below.

Restitution payments shall be made payable to: Clerk, U.S. District Court and mailed to 399 Federal Building, 110 Michigan, N.W., Grand Rapids, MI 49503, or any divisional U.S. District Court Clerk's office, for disbursement to the following victim(s):

Name of Payee	** Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A. x – In full immediately; or

B. □ $ ___ immediately, balance due (in accordance with C, D, or E); or

C. □ not later than ___; or

D. □ in installments to commence ___ days after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E. □ in ___ (e.g., equal, weekly, monthly, quarterly) installments of $ ___ over a period of ___ year(s) to commence ___ days after the date of this judgment.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

□ Joint and Several

□ The defendant shall pay the cost of prosecution.
□ The defendant shall pay the following court cost(s):

□ The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period

of imprisonment, payment of the criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary payments are to be made as directed by the court, the probation officer or the United States attorney,

STATEMENT OF REASONS

□ The court adopts the factual findings and guideline application in the presentence report.

OR

x – The courts adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): The Court did not find obstruction of justice pursuant to § 2D1.1(c)(1) and thereby deleted two points from the total offense level. The Court also determined that pursuant to *Apprendi v. New Jersey*, 120 S.Ct. 2348, defendant's maximum statutory exposure on each count was limited to twenty (20) years.

Guideline Range Determined by the Court:

Total Offense Level: 38
Criminal History Category: 1
Imprisonment Range: 235 to 240 months
Supervised Release Range: 3 to 5 years
Fine Range: $25,000.00 to $2,000,000.00

□ Fine is waived
x – Fine is below the guideline range, because of the defendant's inability to pay.

Total Amount of Restitution: $

□ Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

□ For offenses committed on or after September 13, 1994, but before April 23, 1996, that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

□ Partial restitution is ordered for the following reason(s):

x – The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

□ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): **

OR

□ The sentence departs from the guideline range

□ upon motion of the government, as a result of defendant's substantial assistance.

□ for the following reason(s):

No: 04-1315

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CETEWAYO ASKIA-BRIGGS,	)	Filed: Jan. 11, 2005
Petitioner-Appellant,	)	
v.	)	ORDER
UNITED STATES OF	)	
AMERICA,	)	
Respondent-Appellee.	)	
	)	

Before: MARTIN, Circuit Judge.

Cetewayo Askia Briggs applies for a certificate of appealability in his appeal of a district court judgment denying his motion to vacate his sentence filed pursuant to 28 U.S.C. § 2255. *See* Fed R. App. P. 22(b). He has also filed a motion to amend his application, essentially arguing that his sentence is illegal in light of the Supreme Court's recent decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004).

In 2000, a jury convicted Briggs of conspiring to manufacture cocaine base in violation of 21 U.S.C. §§ 841 and 846 and manufacturing cocaine base in violation of 21 U.S.C. § 841. The court sentenced him to a total of 240 months of imprisonment. A panel of this court affirmed Briggs's convictions and sentence on appeal. *United States v. Briggs*, No. 00-2012, 2001 WL 1609849 (6th Cir. Dec. 12, 2001).

Thereafter, Briggs filed a § 2255 motion, arguing that trial counsel rendered ineffective assistance in numerous respects.

Upon review, the district court denied the motion as without merit.

A certificate of appealability may issue only if the petitioner makes a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The court concludes that Briggs has made such a showing as to the issues raised in his § 2255 motion. The application for a certificate of appealability is granted as to the following issues: 1) whether trial counsel rendered ineffective assistance; and 2) whether his sentence is illegal in light of the Supreme Court's recent decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004). In addition, counsel is hereby appointed to assist in the briefing of these issues, and Briggs is granted pauper status in this appeal. The clerk's office is directed to issue a briefing schedule.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff, File No. 1:00-CR-10

v.

CETEWAYO ASKIA-BRIGGS,

Defendant. /

Sentencing

Before

THE HONORABLE ROBERT HOLMES BELL

United States District Judge

August 23, 2000

APPEARANCES

B. RENE SHEKMER
Assistant U.S. Attorney
P.O. Box 208
Grand Rapids, MI 49501
Attorney for the Plaintiff

FRANK STANLEY
200 N. Division
Grand Rapids, MI 49503
Attorney for the Defendant

Kevin W. Gaugier, CSR-3065
U.S. District Court Reporter

Grand Rapids, Michigan
August 23, 2000
2:17 p.m.

PROCEEDINGS

* * * *

Page 9; lines 12-18:

MR. STANLEY:

I also think that the Apprendi decision speaks in terms of any issue other than a prior conviction that would enhance a sentence beyond the statutory maximum should be decided upon a beyond a reasonable doubt standard by a jury. So I think that there's an interplay that also has to be addressed there by the court concerning the obstruction of justice.

* * * *

Page 10; lines 1-7:

MR. STANLEY:

Again, I don't think – I could find no cases that are controlling on that decision. I think it would be a violation of due process and the Fifth and Sixth Amendment as discussed by Apprendi if the Court were to rule that Mr. Briggs' sentence could exceed 240 by ultimately, in one fashion or the other, stacking consecutive sentences to approach or equal the sentencing guidelines.

* * * *

Page 18, lines 16-24

THE COURT:

This Court finds that because the Sixth Circuit instruction was followed, which this Court had no alternative but to do,

therefore, the jury did not have before it the quantity determination. And the quantity determination under existing law is to, by a preponderance of the evidence, conclude from a trial transcript , from a guilty plea taking, from other sources many times witnesses called, the aggregate amount that can be fairly attributable to a defendant in a conspiracy.

* * * *

Page 21, lines 1-19:

THE COURT:

What happens, though, in this matter is the minimum sentence of 20 years – or the maximum sentence of 20 years which is envisioned here is quickly exceeded by a calculation of multi-kilos of crack-cocaine. And at that point, using the Apprendi decision as the touchstone, it stands to reason as a matter of logic that the quantity is now a significant and an important key to a component of the total offense and hence the total offense level, and hence driving the sentence in the matter. That would not be constitutionally offensive were it not for the fact that in this case where the coordinates find themselves, they find themselves above the statutory maximum.

Therefore, the Court believes in an abundance of caution that this Court, while finding that at least three kilos of crack cocaine is involved, in an abundance of caution the Court should conclude that for purposes of the total offense level calculation, that the total offense level calculation should be adjusted back toward the maximum, which is 240, rather than the 292-365 amount that we have in this case.

* * * *

Page 35, line 14-20:

THE COURT: It becomes the sentence of this Court pursuant to the Sentence Reform Act of 1987, otherwise known as the Sentence Guideline Act, that this Court must sentence in conformity with this finding of an offense level of 38 and a criminal history of level of I, but cognizant of the maximum sentencing provisions which are set forth for this kind of behavior under 841 and 846 of 21 United States Code.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff, File No. 1:00-CR-10

v.

CETEWAYO ASKIA-BRIGGS,

Defendant. /

Jury Trial – Volume II

Before

THE HONORABLE ROBERT HOLMES BELL

United States District Judge

March 21, 2000

APPEARANCES

B. RENE SHEKMER
Assistant U.S. Attorney
P.O. Box 208
Grand Rapids, MI 49501
Attorney for the Plaintiff

CRAIG A. FREDERICK
220 Lyon Square, NW
450 Grand Plaza Place
Grand Rapids, MI 49503
Attorney for the Defendant

Kevin W. Gaugier, CSR-3065
U.S. District Court Reporter

Grand Rapids, Michigan
March 21, 2000
9:05 a.m.

— — —

PROCEEDINGS

* * * *

Page 316, lines 6-9:

THE COURT:

The government is not required to prove that the defendant conspired to manufacture or manufactured any particular amount of cocaine base. Quantity is not an element of these offenses.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

CETEWAYO ASKIA-BRIGGS,

Defendant.

Filed: March 21, 2000

CASE NO. 1:00-CR-10

HON. ROBERT HOLMES BELL

VERDICT FORM

We, the jury, after deliberating have reached the following unanimous verdicts:

Count 1 – Conspiracy to Manufacture Cocaine Base:

☐ Not Guilty

☒ Guilty

Count 2 – Manufacture of Cocaine Base:

☐ Not Guilty

☒ Guilty

Dated: 03/21/2000

Jury Foreperson

UNITED STATES of America
In the United States District Court for
the Western District of Michigan,
Southern Division

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALFONZO DEWAYNE JOHNSON and

CETEWAYO ASKIA-BRIGGS,

Defendants.

_____/

Filed: Jan. 11, 2000

No. 1:00-CR-10

Hon. Robert Holmes Bell

INDICTMENT

The Grand Jury charges:

COUNT ONE

(Cocaine Base Manufacture Conspiracy)

In or about the Summer of 1999, in the Western District of Michigan, Southern Division, the Defendants,

ALFONZO DEWAYNE JOHNSON

and

CETEWAYO ASKIA-BRIGGS,

did knowingly and intentionally combine, conspire, confederate, and agree, with each other, to manufacture cocaine base, a Schedule II controlled substance, in violation of Title 21, United States Code, Sections 846 and 841(a)(1).

21 U.S.C. § 846

21 U.S.C. § 841(a)(1)

21 U.S.C. § 841(b)(1)(A)(iii)

COUNT TWO

(Cocaine Base Manufacture)

In or about the Summer of 1999, in the Western District of Michigan, Southern Division, the Defendants,

ALFONZO DEWAYNE JOHNSON

and

CETEWAYO ASKIA-BRIGGS,

did knowingly and intentionally manufacture cocaine base, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

21 U.S.C. § 841(a)(1)

21 U.S.C. § 841(b)(1)(A)(iii)

18 U.S.C. § 2

COUNT THREE

(Cocaine Base Possession With Intent To Distribute)

In or about the Summer of 1999, in the Western District of Michigan, Southern Division, the Defendant,

ALFONZO DEWAYNE JOHNSON

did knowingly and intentionally possess with intent to distribute cocaine base, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

21 U.S.C. § 841(a)(1)

21 U.S.C. § 841(b)(1)(A)(iii)

A True Bill

GRAND JURY FOREPERSON

MICHAEL H. DETTMER
United States Attorney

B. RENÉ SHEKMER
Assistant United States Attorney
P.O. Box 208
Grand Rapids, Michigan 49501-0208
(616) 456-204

51

FILED
APR 02 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1046

In the Supreme Court of the United States

CETEWAYO ASKIA-BRIGGS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
THOMAS M. GANNON
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether *United States* v. *Booker*, 543 U.S. 220 (2005), announced a new rule under *Teague* v. *Lane*, 489 U.S. 288 (1989).

2. Whether, if *Booker* announced a new rule, it applies retroactively on collateral review.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 4
Conclusion 8

TABLE OF AUTHORITIES

Cases:

Apprendi v. *New Jersey*, 530 U.S. 466 (2000) 2
Blakely v. *Washington*, 542 U.S. 296 (2004) 3
Burton v. *Stewart*, 127 S. Ct. 793 (2007) 7
Cunningham v. *California*, 127 S. Ct. 856 (2007) 7
Gonzales v. *Crosby*, 545 U.S. 524 (2005) 5
Guzman v. *United States*, cert. denied, 127 S. Ct. 495 (2006) 6
Humphress v. *United States*, 398 F.3d 855 (6th Cir. 2005) 7
Mayle v. *Felix*, 545 U.S. 644 (2005) 5
Miller-El v. *Cockrell*, 537 U.S. 322 (2003) 6
State v. *Gomez*, 163 S.W.3d 632 (Tenn. 2005), judgment vacated, No. 05-296 (Feb. 20, 2007) 7
Steel Co. v. *Citizens for a Better Env't*, 523 U.S. 83 (1998) 6
United States v. *Booker*, 543 U.S. 220 (2005) 4
United States v. *Miles*, 25 Fed. Appx. 773 (10th Cir. 2001) 5

Statutes and rule—Continued: Page

21 U.S.C. 841 3
21 U.S.C. 841(a)(1) 2
21 U.S.C. 846 2
28 U.S.C. 2244(b)(2) 5
28 U.S.C. 2244(b)(2)(A) 5
28 U.S.C. 2244(b)(2)(B) 5
28 U.S.C. 2244(b)(3)(C) 6
28 U.S.C. 2244(b)(3)(A) 5
28 U.S.C. 2244(d)(1) 5
28 U.S.C. 2255 ..... 2, 3, 5
28 U.S.C. 2255 para. 8(a) 5
Fed. R. Civ. P. 15 5

In the Supreme Court of the United States

No. 06-1046

CETEWAYO ASKIA-BRIGGS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-12a) is not published in the Federal Reporter but is reprinted in 187 Fed. Appx. 540. The opinion of the district court (Pet. App. 13a-17a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 2006. A petition for rehearing was denied on October 31, 2006 (Pet. App. 1a). The petition for a writ of certiorari was filed on January 29, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District court for the Western District of Michigan, petitioner was convicted of conspiring to manufacture cocaine base,

in violation of 21 U.S.C. 846, and of manufacturing cocaine base, in violation of 21 U.S.C. 841(a)(1). Pet. App. 13a. The district court sentenced him to concurrent terms of 240 months of imprisonment on each count of conviction, to be followed by a five-year period of supervised release. *Ibid.* The court of appeals affirmed. *Id.* at 19a-27a.

On March 31, 2003, petitioner moved under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence. Pet. 5. On January 7, 2004, the district court denied the motion. Pet. App. 13a-17a. On January 11, 2005, the court of appeals granted a certificate of appealability. *Id.* at 38a-39a. On June 30, 2006, the court of appeals affirmed the denial of petitioner's Section 2255 motion. *Id.* at 2a-12a.

1. On October 19, 1999, police officers arrested petitioner on an outstanding traffic warrant. Pet. App. 19a. After petitioner had been advised of his rights, he admitted to two police officers that he had cooked crack cocaine for two other persons. *Id.* at 20a. Petitioner was indicted on one count of conspiring to manufacture cocaine base, in violation of 21 U.S.C. 846, and one count of manufacturing cocaine base, in violation of 21 U.S.C. 841(a)(1). Pet. App. 20a.

2. On March 20, 2000, a jury found petitioner guilty on both counts. Pet. App. 20a. At trial, the district court instructed the jury that it was not required to find a particular quantity of crack cocaine. *Id.* at 45a. At sentencing, the district court found by a preponderance of the evidence that petitioner's offenses involved at least three kilograms of crack cocaine and that his United States Sentencing Guidelines range, accordingly, was 292-365 months of imprisonment. *Id.* at 42a. In light of this Court's decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and out of an "abundance of cau-

tion," the court imposed concurrent sentences of 240 months of imprisonment, the statutory maximum. Pet. App. 42a-43a. See 21 U.S.C. 841 (setting maximum term of imprisonment).

3. Petitioner appealed, and the court of appeals affirmed. Pet. App. 19a-27a. On plain error review, the court of appeals held that the district court had not committed an *Apprendi* error because petitioner's sentence had not exceeded the statutory maximum term of 20 years of imprisonment. *Id.* at 26a-27a. This Court denied review on April 15, 2002. *Id.* at 18a.

4. On March 31, 2003, petitioner filed a Section 2255 motion, claiming that he had received ineffective assistance of counsel because his counsel had not conducted an adequate pretrial investigation and had not advised petitioner of the benefits of pleading guilty. Pet. App. 13a-17a. The district court denied the motion without a hearing. *Id.* at 17a.

5. Petitioner sought a certificate of appealability from the district court on its denial of his Section 2255 motion. The district court denied a certificate of appealability. See 1:03-CV-00215-RHB Docket entry (W.D. Mich. Mar. 16, 2004); C.A. App. 90. On May 5, 2004, petitioner filed a motion in the court of appeals for a certificate of appealability. See 04-1315 Docket entry (6th Cir. May 10, 2004). On July 26, 2004, petitioner filed a motion entitled "Leave to Amend Certificate of Appealability" (Mot.), in which he raised, for the first time in his collateral attack on his conviction, a claim that his sentence was illegal under *Blakely* v. *Washington*, 542 U.S. 296 (2004).[1] On January 11, 2005, the court of ap-

---

[1] In his motion, petitioner linked (Mot. 3-4) the *Blakely* claim with the *Apprendi* claim that the court of appeals, on direct review, had

peals granted a certificate of appealability on petitioner's ineffective assistance claim and on his *Blakely* claim. Pet. App. 38a-39a.

In his brief on appeal, petitioner reasoned that the intervening decision in *United States* v. *Booker*, 543 U.S. 220 (2005), "govern[ed] *Blakely* claims" and so recharacterized the question in the certificate of appealability as whether *Booker* applies retroactively to cases on collateral review. Pet. C.A. Br. 3 n.1. Because of binding precedent in the Sixth Circuit holding against that view, petitioner's brief did not argue the question but merely preserved petitioner's objection in the event that the binding precedent was reversed. *Ibid.* Accordingly, the government's brief addressed only petitioner's ineffective assistance of counsel claim. See Gov't C.A. Br. 7.

The court of appeals affirmed, holding that petitioner's counsel was not ineffective. Pet. App. 2a-12a. In a footnote noting petitioner's admission that circuit precedent foreclosed his claim that *Booker* should apply retroactively in his case, the court of appeals determined that it "need not further address his challenge to the constitutionality of the guidelines." *Id.* at 3a n.1.

ARGUMENT

Petitioner contends (Pet. 6) that his case presents the question whether this Court's decision in *Booker* is retroactive to cases on collateral review. That question, however, is not properly presented. Even if it were, the courts of appeals all agree that *Booker* is not retroactive, and further review by this Court is not warranted.

---

reviewed for plain error, see Pet. App. 26a-27a. Petitioner acknowledged (Mot. 6) that he had not included his *Apprendi* claim in his initial Section 2255 motion.

1. In this Section 2255 proceeding, petitioner raised his sentencing claim for the first time in a supplemental motion for a certificate of appealability in the court of appeals. His original Section 2255 motion in the district court did not challenge his sentencing; petitioner conceded as much in the supplemental motion. See note 1, *supra*. A post-judgment motion raising claims not raised in the original Section 2255 complaint is a second or successive petition. See *Gonzalez* v. *Crosby*, 545 U.S. 524, 531 (2005); see also 28 U.S.C. 2244(b)(2). Because petitioner's supplemental motion was filed in the court of appeals and styled as a request for authorization to raise the new sentencing claim, the motion is best construed as a motion for authorization to file a second or successive petition.[2] See, *e.g.*, *United States* v. *Miles*, 25 Fed. Appx. 773 (10th Cir. 2001); see also 28 U.S.C. 2244(b)(3)(A). A prisoner can file a second or successive collateral petition only if the new claim is based on newly discovered evidence, see 28 U.S.C. 2244(b)(2)(B), 2255 para. 8(1), or if the claim is based on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," 28 U.S.C. 2244(b)(2)(A), 2255 para. 8(2). Petitioner's sentencing claim does not satisfy either requirement: it is not based on new evidence, and this

---

[2] Petitioner's motion should not be construed as a motion to amend his original 2255 complaint because it was filed in the court of appeals, not the district court. See Fed. R. Civ. P. 15. Even if the motion had been filed with the district court, amendment would be untimely. Petitioner had until April 15, 2004—one year from the date that this Court denied his petition for a writ of certiorari (Pet. App. 18a) and his conviction and sentence became final, 28 U.S.C. 2244(d)(1)—to amend his complaint and add new claims, see *Mayle* v. *Felix*, 545 U.S. 644, 650 (2005), but he did not file the motion until July 26, 2004.

Court has not heretofore held *Booker* to be retroactive to cases on collateral review. The court of appeals, accordingly, was without authority to issue the certificate of appealability with respect to petitioner's sentencing claims.[3] See 28 U.S.C. 2244(b)(3)(C).

Even if the court of appeals could have authorized petitioner to file a second or successive application, the district court, not the court of appeals, should have considered petitioner's sentencing claim in the first instance. Until the proper procedures are followed and a proper certificate of appealability has been issued, "federal courts of appeals lack jurisdiction to rule on the merits" of petitioner's sentencing claim. *Miller-El* v. *Cockrell*, 537 U.S. 322, 336 (2003).

2. In any event, petitioner's claim (Pet. 6-26) that *Booker* applies retroactively to his case lacks merit. As the government has explained in its brief in opposition to one of the many petitions raising that same claim, the claim does not warrant this Court's review. See Br. in Opp. at 6-11, *Guzman* v. *United States*, cert. denied, 127 S. Ct. 495 (2006) (No. 06-5662). All of the courts of appeals with criminal jurisdiction have correctly concluded that *Booker* is not retroactive because it is a new rule of criminal procedure and is not a watershed rule, and this Court has denied review in numerous cases raising the issue. There is no reason for a different result here.

Petitioner contends (Pet. 12-15) that review is warranted because the decision of the Supreme Court of

---

[3] The government did not waive these procedural objections to petitioner's motion by failing to raise them in the court of appeals. Whether a claim raised on collateral review is second or successive implicates the jurisdiction of the court, see *Burton* v. *Stewart*, 127 S. Ct. 793, 796 (2007), and thus is not subject to waiver. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998).

Tennessee in *State* v. *Gomez*, 163 S.W.3d 632 (Tenn. 2005), judgment vacated, No. 05-296 (Feb. 20, 2007), is in conflict with the decision of the court of appeals in *Humphress* v. *United States*, 398 F.3d 855 (6th Cir. 2005), on which the court of appeals relied (see Pet. App. 3a n.1) in this case. Petitioner is mistaken. Since the filing of the petition for a writ of certiorari, this Court has vacated the judgment in *Gomez* and remanded the case to the Supreme Court of Tennessee for further consideration in light of *Cunningham* v. *California*, 127 S. Ct. 856, 868-871 (2007). Accordingly, there is now no judgment in *Gomez* that could conflict with *Humphress*. In any event, the question presented in *Gomez* was whether this Court's decision in *Blakely* announced a new rule; the statement in *Gomez*, 163 S.W.3d at 650 n.14, that *Booker* did not announce a new rule was pure dictum.[4]

---

[4] Contrary to petitioner's suggestion (Pet. 12 n.5), the retroactivity of *Booker* presents distinct issues from the retroactivity of *Blakely*, and resolution of the former question—the only one presented in this case—would be of little help to resolution of the latter. Under *Blakely*, a heightened standard of proof applies to facts that raise the maximum sentence; under *Booker*, because the Guidelines are advisory, no heightened standard of proof applies. The only retroactivity question posed by *Booker* is therefore whether the incremental degree of discretion that federal courts possess under *Booker* warrants treatment of *Booker* as a watershed rule. It clearly does not.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

ALICE S. FISHER
Assistant Attorney General

THOMAS M. GANNON
Attorney

APRIL 2007

APR 12 2007
OFFICE OF THE CLERK

No. 06-1046

IN THE

Supreme Court of the United States

CETEWAYO ASKIA BRIGGS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

JOHN Q. LEWIS*
WILLIAM BLAISE WARREN
JONES DAY
901 Lakeside Avenue
Cleveland, OH 44114
(216) 586-3939

Counsel for Petitioner

* *Counsel of Record*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

(1) Whether *United States v. Booker*, 543 U.S. 220 (2005), announced a new rule under *Teague v. Lane*, 489 U.S. 288 (1989), or was dictated by *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

(2) Whether, if *Booker* announced a new rule, it applies retroactively on collateral review.

TABLE OF CONTENTS

		Page
QUESTIONS PRESENTED		i
TABLE OF AUTHORITIES		iii
DISCUSSION		1
I.	PETITIONER RAISED THE *BOOKER* ISSUE IN HIS INITIAL § 2255 MOTION	1
II.	PETITIONER DID NOT FILE A SECOND OR SUCCESSIVE MOTION UNDER 28 U.S.C § 2255	3
III.	PETITIONER'S AMENDMENT WAS PROPERLY FILED IN THE COURT OF APPEALS	5
IV.	THE GOVERNMENT WAIVED ANY OPPOSITION TO THE SIXTH CIRCUIT'S ISSUANCE OF A CERTIFICATE OF APPEALABILITY	7
V.	THE MERITS OF PETITIONER'S ARGUMENT FOR CERTIORARI REMAIN COMPELLING	8
CONCLUSION		9

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Apprendi v. New Jersey, 530 U.S. 466 (2000).....i, 1

Beavers v. Lockhart, 755 F.2d 657 (8th Cir. 1985) 5

Blakely v. Washington, 542 U.S. 296 (2004), *reh'g denied*, 542 U.S. 961 (2004).....3, 8

Blackledge v. Allison, 431 U.S. 63 (1977).....2

Bounds v. Smith, 430 U.S. 817 (1977), *overruled-in-part on other grounds*, *Lewis v. Casey*, 518 U.S. 343, 354 (1996).....2

Burton v. Stewart, 127 S. Ct. 793 (2007).....7

Cunningham v. California, 127 S. Ct. 856 (2007).....8

Diaz v. United States, 930 F.2d 832 (11th Cir. 1991).....4

Franklin v. Rose, 765 F.2d 82 (6th Cir. 1985).....2

Giarratano v. Procunier, 891 F.2d 483 (4th Cir. 1989), *cert. denied*, 498 U.S. 881 (1990).....4

Guidroz v. Lynaugh, 852 F.2d 832 (5th Cir. 1988) 2

Hormel v. Helvering, 312 U.S. 552 (1941).....5

Mayle v. Felix, 545 U.S. 644 (2005).....6, 7

Mayo v. Lynaugh, 893 F.2d 683 (5th Cir. 1990), *cert. denied*, *Collins v. Mayo*, 502 U.S. 898 (1991).....4

TABLE OF AUTHORITIES
(Continued)

Page(s)

McClesky v. Zant, 499 U.S. 467 (1991), *reh'g denied*, 501 U.S. 1224 (1991) 3

McNeil v. United States, 508 U.S. 106 (1993) 2

Miller-El v. Cockrell, 537 U.S. 322 (2003) 5, 6

Petty v. McCotter, 779 F.2d 299 (5th Cir. 1986), *cert. dismissed*, 480 U.S. 699 (1987) 5

Rose v. Lundy, 455 U.S. 509 (1982) 6

Ross v. Kemp, 785 F.2d 1467 (11th Cir. 1986) 5

Slack v. McDaniel, 529 U.S. 473 (2000) 6

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998) 7

Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), *rev'd on other grounds*, 462 U.S. 862 (1983) 5

Teague v. Lane, 489 U.S. 288 (1989) i

United States ex. rel. McCall v. O'Grady, 908 F.2d 170 (7th Cir. 1990) 5

United States v. Booker, 543 U.S. 220 (2005) ..... i, 1, 8

United States v. Miles, 25 Fed. Appx 773 (10th Cir. 2001) 4

Willis v. Collins, 989 F.2d 187 (5th Cir. 1993) 4

TABLE OF AUTHORITIES
(Continued)

Page(s)

STATE CASES

Smart v. State, 146 P.3d 15 (Alaska 2006) 9

State v. Gomez, 163 S.W.3d 632 (Tenn. 2005), *vacated, Gomez v. Tennessee*, 127 S. Ct. 1209 (2007) 8, 9

FEDERAL STATUTES AND RULES

28 U.S.C. § 2242 4

28 U.S.C. § 2244(b)(3)(C) 6

28 U.S.C. § 2253(c)(2) 5

28 U.S.C. § 2254 4

28 U.S.C. § 2255 4

Fed. R. Civ. P. 15 4

Fed. R. Civ. P. 15(a) 4

Fed. R. Civ. P. 15(b) 4

Fed. R. Civ. P. 81(a)(2) 4

Petitioner Cetewayo Askia Briggs respectfully submits this reply to the United States' Brief in Opposition to the Petition for Writ of Certiorari.

DISCUSSION

Petitioner's case presents an appropriate vehicle to determine whether *Booker* applies retroactively to cases on collateral review. Petitioner preserved the *Booker* issue first in his direct review papers, then in his § 2255 motion and, finally, in the appeal of the dismissal of his § 2255 motion. Contrary to the Government's arguments, there is no procedural bar to Petitioner's *Booker* claim.

I. PETITIONER RAISED THE *BOOKER* ISSUE IN HIS INITIAL § 2255 MOTION

The Government argues that Petitioner "raised his sentencing claim for the first time in a supplemental motion for certificate of appealability in the court of appeals." Br. in Opp'n at 5. This assertion is incorrect. Petitioner raised his sentencing claim throughout his direct review and in his § 2255 motion.

At each stage of his direct review, Petitioner claimed his sentence violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000). During his sentencing hearing on August 23, 2000, Petitioner argued that *Apprendi* prohibited the district court from determining by a preponderance of the evidence facts that would raise his maximum sentence -- the very issue that ultimately was decided in favor of his position in *United States v. Booker*, 543 U.S. 220 (2005). Pet. App. 41a. The district court disagreed and determined the quantity of cocaine base involved in Petitioner's offenses by a preponderance of the evidence. *Id.* at 42a. Petitioner then appealed his conviction and sentence to the Sixth Circuit, which rejected Petitioner's *Booker*-like arguments and held that the district court did not violate *Apprendi*. Pet. App. 26a-27a. This Court denied certiorari on April 15, 2002. Pet. App. 18a.

When Petitioner filed his first (and only) motion under 28 U.S.C. § 2255 nearly one year later, he preserved the *Booker* issue for collateral review. On March 31, 2003, Petitioner, acting pro se, moved to vacate, set aside, or correct his sentence based on "a denial of Petitioner's 5th Amendment right to Due Process and 6th Amendment rights to effective assistance of counsel and a fair trial by an impartial jury." Motion to Vacate, Set Aside, or Correct Sentence at 2, Briggs v. United States, No. 03-cv-00215-RHB (W.D. Mich. Mar. 31, 2003). Petitioner enumerated the facts underlying his *Booker* claim: "No instruction was given to the jury about quantity; rather the jury was instructed that the penalty would be determined by the Court." *Id.* at 14; *accord* Br. in Opp'n at 2. Petitioner clearly pleaded the facts and constitutional violations underlying his *Booker* claim.

Petitioner needed to plead no more in order to adequately preserve his *Booker* claim for collateral review. As the Court has stated, "a habeas corpus petition or civil rights complaint need only set forth facts giving rise to the cause of action . . . ." *Bounds v. Smith*, 430 U.S. 817, 825 (1977), *overruled-in-part on other grounds*, *Lewis v. Casey*, 518 U.S. 343, 354 (1996); *accord Blackledge v. Allison*, 431 U.S. 63, 75 n.7 (1977); *Guidroz v. Lynaugh*, 852 F.2d 832, 834 (5th Cir. 1988); *Franklin v. Rose*, 765 F.2d 82, 85 (6th Cir. 1985) (per curiam); *see also McNeil v. United States*, 508 U.S. 106, 113 (1993) (pro se pleadings should be liberally construed). By including the facts underlying his *Booker* claim in his § 2255 motion, Petitioner successfully raised the issue with the district court.

The Government does not suggest a method by which Petitioner could have better preserved the *Booker* issue. Petitioner fully litigated his *Apprendi* claims on direct review. Petitioner then included in his § 2255 motion the facts and constitutional doctrines necessary for further adjudication of his sentencing claim, consistent with *Bounds*, *supra*. After the district court rejected his § 2255 motion,

Pet. App. 13a-17a, Petitioner filed for a certificate of appealability ("COA") from the district court pursuant to 28 U.S.C. § 2253(c). Motion for Certificate of Appealability, Briggs v. United States, No. 03-cv-00215-RHB (W.D. Mich. Mar. 3, 2004). When this was denied, Br. in Opp'n at 3, Petitioner filed another motion for a COA with the Sixth Circuit. Motion for Certificate of Appealability, Briggs v. United States, No. 04-1315 (6th Cir. May 10, 2004). Several weeks later, the Court decided *Blakely v. Washington*, 542 U.S. 296 (2004), *reh'g denied*, 542 U.S. 961 (2004). Petitioner immediately notified the Sixth Circuit that -- consistent with the position he had taken throughout his direct and collateral reviews -- he intended to claim his sentence was illegal in light of *Blakely*, and he sought to "amend" his motion for a COA, which the Government did not oppose. Motion for Leave to Amend Certificate of Appealability, Briggs v. United States, No. 04-1315 (6th Cir. Jul. 26, 2004). The Sixth Circuit then issued a COA specifically permitting Petitioner to argue that "his sentence is illegal in light of the Supreme Court's recent decision in *Blakely* . . . ." Pet App. 38a-39a.

Petitioner's claim is properly preserved for review by this Court.

II. PETITIONER DID NOT FILE A SECOND OR SUCCESSIVE MOTION UNDER 28 U.S.C. § 2255

The Government's contention that Petitioner's amended motion for a COA somehow rose to be a "second or successive" § 2255 motion within the meaning of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") is without merit. The Court's jurisprudence permits § 2255 petitioners to present additional claims after the initial pleading as long as they have "a legitimate excuse for failing to raise the claim at the appropriate time." *McClesky v. Zant*, 499 U.S. 467, 490 (1991), *reh'g denied*, 501 U.S. 1224 (1991). Several courts of appeals have

permitted habeas petitioners to argue previously-unavailable claims without requiring the petitioners to file "second or successive" habeas petitions. *E.g., Willis v. Collins*, 989 F.2d 187, 189 (5th Cir. 1993); *Diaz v. United States*, 930 F.2d 832, 835-36 (11th Cir. 1991); *Mayo v. Lynaugh*, 893 F.2d 683, 685 (5th Cir. 1990), *cert. denied, Collins v. Mayo*, 502 U.S. 898 (1991); *Giarratano v. Procunier*, 891 F.2d 483, 485-86 (4th Cir. 1989), *cert. denied,* 498 U.S. 881 (1990). The Government's authority illustrates the opposite situation, where a petitioner was foreclosed from raising an issue later that he could have argued in his initial pleading. *See United States v. Miles*, 25 Fed. App'x 773 (10th Cir. 2001).

Further, Rule 15 allows for liberal amendments in habeas pleadings. *See* Fed. R. Civ. P. 15, 81(a)(2); 28 U.S.C. §§ 2242, 2254, 2255. Rule 15 allows petitioners to amend their petitions after a responsive pleading has been filed "by leave of court . . . when justice so requires," Fed. R. Civ. P. 15(a), and allows adjudication of issues not raised in the pleadings by "express or implied consent" of the parties. *Id.* at 15(b). The Government cannot seriously contend that each amendment is itself a "second or successive" motion within the meaning of 28 U.S.C. § 2255, let alone that the amendment here was "second or successive" given that it was permitted by the Sixth Circuit and tried by implied (if not express) consent of the parties, *infra*.

The Government's argument is premised on a distortion of Petitioner's proper filing of an amended request for a COA with the court of appeals. Transforming that filing into a "second or successive" § 2255 motion requires two illogical jumps: (1) that the amended motion for a COA was actually an amended § 2255 motion, and (2) that the amended § 2255 motion was actually a *new* § 2255 motion, notwithstanding Rule 15's liberal amendment policies. There is no basis to construe Petitioner's amendment in that manner.

III. PETITIONER'S AMENDMENT WAS PROPERLY FILED IN THE COURT OF APPEALS

Petitioner followed the correct procedure by amending his motion for a COA with the Sixth Circuit. At that stage in his proceedings, Petitioner had no other alternatives. The district court had already denied his § 2255 motion, Pet. App. 13a-17a; therefore, he could not amend his § 2255 motion. Additionally, Petitioner's motion for a COA had already been denied by the district court. When Petitioner realized the Court's recent opinion in *Blakely* bolstered his sentencing claim, his sole remaining remedy was to amend the motion for a COA already pending with the Sixth Circuit.

The only issue bearing on whether the Sixth Circuit could hear Petitioner's appeal, including his amended sentencing claim, was whether he had made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 349 (2003) (Scalia, J., concurring). Although appellate courts do not ordinarily decide issues raised for the first time on appeal, there is often an exception made when "injustice might otherwise result." *Hormel v. Helvering*, 312 U.S. 552, 557 (1941); *Beavers v. Lockhart*, 755 F.2d 657, 662 (8th Cir. 1985). Several circuit courts have allowed habeas petitioners to argue claims on appeal that were not present in the district court proceedings. *E.g., United States ex. rel. McCall v. O'Grady*, 908 F.2d 170, 175 n.6 (7th Cir. 1990) (allowing § 2254 petitioner to raise issue for the first time on appeal when raised at "its earliest opportunity"); *Ross v. Kemp*, 785 F.2d 1467, 1478 (11th Cir. 1986) (permitting habeas petitioner to supplement the record on appeal); *Petty v. McCotter*, 779 F.2d 299, 302 (5th Cir. 1986), *cert. dismissed*, 480 U.S. 699 (1987) (allowing pro se habeas litigant to supplement factual basis for claim for first time on appeal); *Stephens v. Zant*, 631 F.2d 397, 406-07 (5th Cir. 1980), *rev'd on other grounds*, 462 U.S. 862 (1983)

(allowing habeas petitioner to raise on appeal grounds for relief not raised at the district court).

Contrary to the Government's assertions, Br. in Opp'n at 6, habeas corpus jurisdiction in the courts of appeals does not depend as much on the correct *procedures* being followed in lower courts as it does on whether the petitioner made a substantial showing of the denial of a constitutional right. *See Slack v. McDaniel*, 529 U.S. 473, 483 (2000) ("Congress expressed no intention to allow trial court procedural error to bar vindication of substantial constitutional rights on appeal."); *Rose v. Lundy*, 455 U.S. 509, 520 (1982). Indeed, had the Government quoted the entirety of its citation from *Miller-El v. Cockrell*, Br. in Opp'n at 6, it confirms that the only "procedure" necessary for a court of appeals to rule on a § 2255 motion is whether a COA has been issued. *Miller-El*, 537 U.S. at 336 ("As a result, *until a COA has been issued* federal courts of appeals lack jurisdiction to rule on the merits of appeal from habeas petitioners.") (emphasis added). Because the Sixth Circuit issued a COA on Petitioner's *Blakely* claim -- without opposition from the Government -- that should end the inquiry.[1]

Petitioner also timely sought his amendment. *See* Br. in Opp'n at 5 n. 2. Even to the extent Petitioner's amended motion for a COA is viewed as an amended § 2255 motion (and it should not, *supra*), it would have been timely under Rule 15(c). According to *Mayle v. Felix*, 545 U.S. 644 (2005), "[s]o long as the original and amended petitions state claims that are tied to a common core of operative facts,

---

[1] The Government's argument that the Sixth Circuit lacked authority to issue the COA depends entirely on its contention that Petitioner's amended motion for a COA constituted a "second or successive" motion. *See* 28 U.S.C. § 2244(b)(3)(C). Because Petitioner's amendment was not a "second or successive" motion, *supra*, the Sixth Circuit was within its authority to issue the COA.

relation back [under Rule 15(c)(2)] will be in order." *Id.* at 664. Petitioner's first (and only) § 2255 motion alleged the facts underlying his sentencing claim. *Supra.* There is no question that any "amendment" would have been tied to the same "common core of operative facts."

IV. THE GOVERNMENT WAIVED ANY OPPOSITION TO THE SIXTH CIRCUIT'S ISSUANCE OF A CERTIFICATE OF APPEALABILITY

When the Sixth Circuit issued a COA on January 11, 2005, Pet. App. 38a-39a, the Government could have objected that the Sixth Circuit lacked authority or jurisdiction, but chose not to do so. So, too, when the Government filed its brief at the Sixth Circuit on July 25, 2005, and when the Government argued its case before the Sixth Circuit on November 29, 2005. The Government chose not to contest the COA at any stage in the court below. *See* Final Brief for the United States at 7, Briggs v. United States, No. 04-1315 (6th Cir. July 25, 2005). Because it has waited over two years to contest the Sixth Circuit's authority, the Government has waived that objection.[2]

---

[2] The Government contends it cannot waive these arguments because they are jurisdictional. Br. in Opp'n at 6 n.3. This contention is without merit. Since Petitioner did not file a "second or successive" motion, *supra*, the district court would have had jurisdiction to hear Petitioner's amended claims, and the Sixth Circuit was within its authority to issue a COA. *Contra Burton v. Stewart*, 127 S. Ct. 793, 796 (2007) ("Over three years subsequent . . . [petitioner] filed another federal habeas petition . . . ."). Even if the Government had a viable argument against jurisdiction in the district court, it is premature to raise it now before this Court grants certiorari. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998) ("[When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.") (internal quotation marks omitted).

V. THE MERITS OF PETITIONER'S ARGUMENT FOR CERTIORARI REMAIN COMPELLING

For the reasons already explained in the Petition for Writ of Certiorari, the question of whether *Booker* should be applied retroactively to cases on collateral review could have important consequences for federal prisoners nationwide, as well as state prisoners subject to the *Blakely* decision.[3] Several courts of appeals have misapplied the Court's precedent in holding that *Booker*'s rule was not dictated by *Apprendi*, or, in the alternative, was not a new rule deserving retroactive application. This Court should set right the errors in the courts below.

The fact that *State v. Gomez*, 163 S.W.3d 632 (Tenn. 2005), has been vacated is of no moment. This Court

---

[3] As Petitioner has argued, Pet. 12 n.5, this Court's decision on *Booker*'s retroactivity would guide the lower courts in determining *Blakely*'s retroactivity as well. The Government attempts to distinguish the two cases by extracting a perceived "heightened standard of proof," Br. in Opp'n at 7 n.4, applicable to facts decided under *Blakely*. To the contrary, both *Booker* and *Blakely* require that facts raising a defendant's maximum sentence be admitted by the defendant or proved to a jury *beyond a reasonable doubt*. *Booker*, 543 U.S. at 244; *Blakely*, 542 U.S. at 301; *see also Cunningham v. California*, 127 S. Ct. 856, 863-64 (2007) ("This Court has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence."). The fact that *Booker* rendered the Federal Sentencing Guidelines advisory, *Booker*, 543 U.S. at 245-46, has no bearing on whether facts raising a defendant's maximum sentence must be determined by a jury beyond a reasonable doubt, as they must under *Apprendi*, *Blakely*, and *Booker*. Indeed, *Booker*'s "beyond a reasonable doubt" standard, as applied to facts that previously would have been determined under the Sentencing Guidelines by a preponderance of the evidence, is part of what makes *Booker* a watershed rule. Pet. 24-26.

vacated *Gomez* for further consideration in light of *Cunningham*. *Gomez v. Tennessee*, 127 S. Ct. 1209 (2007). *Cunningham* did not decide any questions related to retroactivity. Also, as already cited by Petitioner, Pet. 14, *Gomez* was not the only decision that would have afforded *Blakely/Booker* retroactive status. *See Smart v. State,* 146 P.3d 15, 54 (Alaska 2006) (Mannheimer, judge, concurring). Where there is disagreement this Court can resolve, and where courts below have ignored the Court's retroactivity precedent, it is appropriate for the Court to grant certiorari to resolve the issue.

CONCLUSION

For the reasons set forth herein and in Petitioner's opening petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JOHN Q. LEWIS*
WILLIAM BLAISE WARREN
JONES DAY
901 Lakeside Avenue
Cleveland, OH 44114
(216) 586-3939

Counsel for Petitioner

** Counsel of Record*

April 12, 2007